

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE No: HAC 96 of 2018

THE STATE

vs.

MUSTAQ ALI

Counsel : Mr. Mohammed Rafiq with Mr. Singh with for State
Mr. Roneel Kumar for the Defence

Dates of Hearing : 18, 19, 20 January 2023
Date of Judgement : 25 January 2023

JUDGMENT

1. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009. The Prosecution in the amended information alleges that the Accused between the 01st day of April, 2011 and 30th June 2011 at Lautoka, in the Western Division, had carnal knowledge of Yasmin Nisha, the Complainant, without her consent.
2. The accused pleaded not guilty to the charge. The trial commenced on the 18 January 2023 and concluded on the 10 January 2023. The Prosecution presented the evidence of the complainant and the Scientific Officer of the Fiji Police Forensic Lab. At the end of the Prosecution case, the accused was put to his defence. The accused exercised his right to remain silent. Defence called Nazreen, wife of the accused, youngest son Afroz and complainant's ex-husband Suliasi to support the case for Defence. The counsel tendered written submissions. Having carefully considered the evidence presented at the trial and the submissions, I now proceed to pronounce my judgment as follows.
3. I am mindful that the Prosecution bears the burden to prove all the elements of the offence and that proof must be beyond reasonable doubt. The burden never shifts to the Accused at any stage of the

trial. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond reasonable doubt.

4. According to the Amended Information, the accused is charged with Rape under Section 207(2) (a) of the Crimes Act which describes the offence of Rape as follows: a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent. In the context of this case, 'carnal knowledge' could be defined as an act of penetration of the vagina of the complainant with the penis of the accused. A 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 give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent.
5. A consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given. The fourth or the mental element of Rape developed by the common law has been retained by this jurisdiction as a matter of policy (there can be no offence in the absence of guilty mind). Accordingly, the Prosecution is required to prove that the accused knew or believed that the Complainant was not consenting or that he was reckless as to whether the Complainant was consenting or not.
6. I shall now summarise the evidence led in this trial.

PW1 - Yashmeen Nisha (Nisha)

7. Nisha (29) is currently staying in Kashmir with her daughter, son Mohammed Shiraz who is 12 years old and her de-facto partner Mohammed Zubair.
8. In 2008, she was staying with her grandfather and studying at Sabeto Muslim Primary School. After competing Form 3, she was supposed to enter Form 4 in 2009. During the school holidays her mother Nazreen Nisha (Nazreen) asked her grandfather if she (Nisha) could be given to her to be with her in Vivai. Initially, the grandfather did not agree. He later agreed because mother had promised to give her education. After that, she went to live with her mother and stepfather Mustaq Ali (Mustaq) in Vaivai, Lautoka in 2008. Stepfather's daughter and his two boys were also living in that house.
9. After coming to her step father's house, she was never sent to school. When she was supposed to go to Form 4 her mother asked her stepfather regarding her education. He said, in their family,

daughters don't go to high school for higher education. She was staying home at stepfather's house since 2008.

10. In 2011, particularly in the months of April to June, she was residing in Vaivai at her stepfather's house with stepfather (Mustaq Ali) and her youngest brother Afroz. Her mother Nazreen Nisha was away in New Zealand. During that period she said she was raped by her stepfather 6 to 7 times, at his in his bedroom.
11. When the first time this happened, she was sleeping in the bedroom in which Mustaq was also sleeping, albeit in a different bed, with her youngest brother Afroz. She used to sleep in that bedroom because her mother had told her to sleep there with her brother who was a class 1 student. That night, she felt someone touching her. She woke up to see her stepfather. She said to him *what are doing ?* He was quiet for a while and then tried to undress her, while touching her legs. She recognised Mustaq from the bright light that was coming from the dining room. She could also recognise his voice. He was wearing only a vest on top but wasn't wearing anything at the bottom.
12. She was wearing pants, Indian salwar kameez and an undergarment. When he was removing her clothes, she started shouting. She tried to stop him. He held her and locked her down in bed. She was crying in pain. She was helpless because it was night. Her brother was fast asleep and there was no one else in the house whom she could shout at and call for help. He came on top of her. She could not run away because he was heavy. He started inserting his penis into her vagina, She felt pain in her vagina. She kept saying 'No' to him. He didn't respond. He just punched her and continued what he was doing until he finished. Then he got off and went out.
13. She felt blood that had come out from her vagina. She was looking at the bed and herself and where he had punched. She was thinking what had happened because it was something that had happened for the first time in her life and particularly by someone whom she was living with and used to call Abba (father). She went to the bathroom and washed herself. She was crying in the bathroom, thinking of what to do because she didn't have a phone. She didn't go back to the room and was awake the whole night. In the morning, Mustaq acted normal as if nothing had happened. Her mother called from New Zealand on her step father's phone and was talking to him. After a while, her mother wanted to talk to her. Than he gave the phone to her. While he was engaged in something, she told her mother what had happened. Her mother said -just keep quiet. Mother blamed her for lying and falsely blaming her stepfather. She denied having lied but her mother did not believe her. She talked to her mother just twice after the incident and then Mustaq wouldn't keep the phone at home. She had no way of communicating with anyone as to what was going on at the house. There were no neighbours in that area as the house was surrounded by the farm. The closest neighbour was

her stepfather's brother whose house was situated quite a distance in a muddy area. To reach there, one has to cross the river which often got flooded.

14. All six to seven incidents that followed also happened in the same bedroom. It was after a few days (after one incident) that Mustaq would approach her again. She remembers the third incident because it happened at night on a rainy day. That day she was awake. Her younger brother was sleeping in the same bedroom. Water was coming into the bedroom through the window where the bed was. Mustaq was trying to do something with the window to stop water coming in. She could see Mustaq as the lights in the dining room were on. He first checked if her brother was sleeping and then came onto her bed. She could realise that he was going to rape her again. There was nothing she could do. She started crying. He was just looking at her. Later on, he tried to touch her face. She was trying to push him away. She even said *what you are doing is wrong; I tell this to mother*. He asked her to come closer and pushed her on the bed. He started pulling down her pants to take out his penis. After that, he got on top of her and started inserting his penis inside her vagina. He continued to do what he had done the other nights. She was feeling helpless. She was in pain in her vagina. After he had stopped, he just got off and went out of the bedroom. He did not say anything to her.
15. The same thing happened six to seven times at late night when her brother goes to sleep. These incidents started to happen in 2011, in particular, between April and June when the mother was away. Until then, she respected Mustaq as her stepfather. She would do everything for everyone-cooking, cleaning, looking after the house and even working in the farm, planting vegetables.
16. The life came back to normal when her mother returned from New Zealand in June 2011. Stepfather stopped raping her. Upon her return, she talked to her mother about what had happened when she was away. Her mother did not believe her and said *'no no he can't do it, he is your father'; this thing never happened, you are just blaming him..* After about two weeks from her return, her mother asked her if she was having her menstruation or not. She said 'no'; Mother said *it's ok some girls have problems, we can get you checked with the doctor*. Mother told Mustaq also about her not having periods.
17. She felt that there is something wrong with her and was thinking about the incidents that took place when the mother was in New Zealand. Mother first took her to a doctor at the Lautoka Hospital. Doctor checked her stomach and sent her for a blood test. Doctor confirmed that *she is pregnant*. Then mother lied to the doctor and said - *before she left, she made her get married, I don't know about it*. She did not have an opportunity to tell the doctor about what her stepfather had done to her because her mother was with her and she was the one talking to the doctor. When she heard the news that she was pregnant, she was shocked.

18. When they came from the hospital, she heard her mother speaking on the phone with one Nazra. Just one week after the hospital visit, her mother and stepfather took her to Nazra in Nadele and wanted to get her baby aborted. Nazra checked her stomach and told her mother that the baby is too big that she can't abort. Mother said that she can't take her back because she did not want everyone to know that she was pregnant. Nazra was asking her mother as to how all these happened. She did tell Nazra's daughter and Nazra that all this happened because her mother was trying to stop her accusing her stepfather. Mother told her not to blame him and not to lie. Every time she was telling them anything, her mother would interrupt and tell what she wanted to say.
19. Her mother and stepfather left her at Nazar's house and left on the same day. Nazar agreed to keep her until the baby is born since she couldn't abort the child. Nazar however put a condition that if she were to remain at her house to deliver the baby, she had to stay with her son Suliasi and put her son's name as the father of the child, to which, her mother and stepfather agreed.
20. She was staying at Nazra's house for six months before she gave birth to a baby boy on 6/2/2012. Delivery took place at Nazar's house. She was not taken to hospital for delivery because her mother was trying to keep everything private. After the baby was born, Nazra's daughter Rukshana wanted her to be taken to hospital. When they reached the hospital, a doctor came to the van and cut the umbilical cord. Most of the time, doctors were talking to Nazra's daughters because she was not well. At the hospital, she did not tell anybody that the baby was resulted from a rape committed by her stepfather. Doctor and nurses were talking to Nazra's daughters. Nobody was asking anything from her.
21. The name given to her son was Mohammed Shiraz. The birth certificate had been made much later as agreed. She has seen her child's birth certificate. According to the birth certificate, the father of the child is Suliasi Botitu, Nazra's son. She continued to reside at Nazar's house for five years because her mother had stopped contacting her. She had nowhere to go to. She had to legally marry Suliasi to put his name on her son's birth certificate. She legally married Suliasi and got two children from that marriage. Later on, she got divorced and, when came out of Nazra's house, she took her elder son Shiraz with her.
22. After leaving Suliasi, she was renting a house of her stepfather's relative in Lautoka, and working as a cashier for Superfood. Whilst there, in 2016, her mother and stepfather came and took her back to Vaivai. In the meantime, Suliasi had filed a custody case for children and she had to attend court. After attending court, she didn't go back with her mother because she was being pressurised a lot for all the incidents that had taken place a few years back -rape, her decision to raise the child, marry Suliasi and have two children with him. Thereafter, she was renting a flat in Simla.

23. She described how the alleged rape incident got reported to police. When she was working for Superfood, Nazra's daughter and her daughter-in-law would come to her workplace and say bad things that she had left her kids and that she had slept with her father. She was receiving calls from families saying that her mother and stepfather were telling everyone that she ran away with Suliasi and got pregnant from him and had kids with him, without telling what actually happened. It was getting too much and finally she decided to report the rape incident to police. When the lady police officer was asking as to how she knew Nazra's daughters, she had to tell the entire story. When she was staying home with her stepfather in Vaivai, she was confined to home and didn't have an opportunity to tell anybody. When she went to Nazra's house, she told Nazra. When her own mother didn't do anything about it, she didn't tell anyone later on.
24. After lodging the complaint, she stopped residing with her stepfather. The police officer took her to her stepfather's house to take some pictures, and later , DNA samples were collected from her and her son.
25. Under cross-examination, the complainant flatly denied that she was expelled from her school or that her grandfather sent her to stay with her mother due to her bad behaviour. She agreed that the birth certificate of her son was made years later in 2016 (04.01. 2016) before the complaint was lodged (16.06.2016). By that time, though legally married to him, she had separated from Suliasi. She never contributed in providing information to the Registry of Births.
26. His son is Mohammed Shiraz but his name is misspelled in the birth certificate (DE 1) to state Mohammed Shihab Tuiqunu. She denied having come back to her stepfather's house before giving birth to the child. She denied having sent Mohammed Karding, her ex-husband to demand \$15,000.00 to withdraw this case. She denied having demanded money from Maushim in 2015 claiming that the child is his. She also denied demanding money from her mother and having threatened to send Mustaq Ali to jail if they din't pay money.
27. She admitted that she had filed a maintenance claim in September 2021 and demanded \$ 92,000 from Mustaq Ali from the date her son was born. In that matter, Mustaq Ali disputed the paternity of the child. That application was struck out on 27/2/22. She denied that her mother had come to the Lalel's Supermarket to pass comments and that was the reason why she made a complaint to get revenge on her mother. She denied Mustaq Ali's father, Sattar, was also staying with them when the alleged rape incidents occurred.
28. She said to police that she was talking to her mother after the first rape incident and that, when her mother returned, she told her mother what had happened. She told the police that Mustaq Ali

punched her on her ribs and head. She told the police that she was shouting, yelling and crying, when Mustaq Ali was forcing himself on her. She told police that both her stepfather and mother took her to Nazar's place at Nadele. She did not mention (to police) that she was taken by her mother and stepfather to Vaivai in 2016 because they (police) never asked about those things. She denied having had sexual intercourse with Moushim Ali.

29. Under re-examination, the complainant said she came to know about her eldest son's birth certificate when Suliasi filed the maintenance case in 2017 or 2018. The maintenance application was struck out because she missed one of the court dates. She file a fresh case.

Case for Defence

DW1: Nazreen Nisha

30. Nazreen lives in Vaivai, with her husband Mustaq Ali, son Afroz Ali and daughter-in-law. She has five children- Mufid Ali, Farisha Farnaaz Ali, Mosheem Ali, Feroz Ali, Afroz Ali. Yashmin Nisha is her daughter. Nisha was with her father and grandfather and was schooling from there at Sabeto Muslim Primary School up to Form 4. After Form 3, Nisha came to live with her. Nisha was not sent to school as her grandfather told her not to educate Nisha anymore because she was not in a good path. When Nisha came to live with her, she got involved with her elder son Mufid Ali. After they scolded her, she separated from Mufid and then involved with her younger son Moushim Ali.
31. In 2011, when she was in New Zealand, she had given her phone to Nisha and was constantly in contact with her. One day, Mustaq called and informed her that Nisha was having love bites on her neck. She told Mustaq to call Farisha and advise Nisha properly. After she returned in three months to Fiji, Nisha told her that Mustaq assaulted her and only her was assaulted and not Moushim for having love bites.
32. One day, Nisha complained that her side was paining. They took took her to a doctor at Lautoka Hospital. The Doctor advised that if Nisha was having menses, then there's nothing to worry. However, she was afraid, because she saw love bites, she took Nisha to another doctor in Martintar who told that Nisha is pregnant. Nisha cried and told that she got involved with Moushim and slept with him. After that she took her to the Lautoka Hospital where Nisha was scanned. When Nisha was being scanned, she stayed outside. Nisha told the doctor, that her stepbrother did this. Then they were advised that it was their family problem.
33. Then she kept Nisha at home for 2- 3 months. Since the river often got flooded, she took Nisha to Suliasi's house, husband's family's house in Nadele. When Nisha was staying at Suliasi's house, she

got naughty and got involved with Suliasi. Then she received a call from Suliasi, asking her to take Nisha back. Then, they went and brought Nisha back home when she was still pregnant. The very next day Nisha developed pains and got admitted to Lautoka Hospital for delivery. When they took the baby stuffs to the hospital, they were told that Nisha had run away with Suliasi from the hospital. They reported the matter to police.

34. Nisha got settled with Suliasi and delivered the baby at Suliasi's house. After that, she got married to Suliasi and was staying with him. She never visited Nisha in 2016. Nisha claimed 92,000 dollars from Mustaq as maintenance. She filed a case against Suliasi asking for child's custody on her son's behalf as Maushim was in Australia.
35. In 2011, Yasmin Nisha, Afroz Ali, Mustaq Ali and her father-in-law Sattar Ali were staying with her in a four bedroom house. While she was away in NZ, Afroz Ali and Nisha were staying in one room, Sattar Ali was staying in another room and Mustaq Ali was in another room.
36. Under cross-examination Nazreen said she did not first mention Nisha as her child because she had left her. Mustaq did not want Nisha at his home but she convinced him to bring Nisha home. Whilst in New Zealand, Nisha never told her that Mustaq raped her. When she asked Nisha why she was having love bites, Nisha told her that she (Nisha) and Maushim are not real brother and sister so they made just love bites that's all.
37. She did tell police that Mustaq's father was also living with them although that is not recorded in her statement. She denied that the only reason she took Nisha to a private doctor in Nadi was to have the child aborted. She is certain that Nisha got pregnant from Maushim. She was waiting for the child to be born to get Maushim Ali married to Nisha because Muslim religion does not allow marriages when someone is pregnant. Before giving birth to child, Nisha ran away with Suliasi and settled. One day, Suliasi called and asked her to take Nisha away, because he didn't want her. Maushim Ali never visited Nisha when she was staying with Suliasi's family. She has never seen Maushim and Nisha having sexual intercourse. But she is sure Moushim is the father of the child.

Suliasi Mohammed Saneem Botitu

38. Suliasi resides at Korobebe, Sabeto. He met his ex-wife Nisha in 2010 at a funeral house when she was pregnant. Nisha's parents brought her to his house because she lived in a flooded area. Nisha said the father of the child is her cousin brother Moushim. He agreed to be the father of her unborn child. She was staying with him and everything was good until she started fighting with him. He then called her father and mother to come and take her. Her parents came and took her. On the next day her mother had taken her to the Lautoka Hospital to get her admitted. Nisha called her and asked him

to take her. After that he went and picked Nisha and took her to his house. He agreed to give his name as the father of the child. Delivery took place at home. Then they took her to the Lautoka Hospital. Three years after the delivery, he married Nisha when the third child was born. Suliasi Mohammed Shiab Botitu is the name given to the child in his birth certificate. He was the one who went and registered the information of the child without Nisha's knowledge. Nisha was not staying with him by that time. Three months ago, Mustaq requested him to be a witness in this case.

39. Under cross-examination, Suliasi said that the **Mustaq is his cousin brother** before he became his father-in-law. He filed a maintenance case against Nisha because she left house leaving three children.

DW2- Mr. Afroz Ali

40. Afroz is the youngest son of the accused. He is 19 years old. In the year 2011, he was staying with his father Mustaq, sister- Yasmin Nisha, brother Maushim, youngest brother Afroz Ali and grandfather Sattar Ali. His house consists of three rooms and in one room, he and his sister Nisha and his brother Moushim used to sleep, father slept in a separate room and the grandfather occupied the third room. He slept with Nisha and Moushim used to sleep in another bed. One night, he wanted to go to the washroom. He used to go to the washroom with his sister. He switched on the small light in the room to go to the wash room. When he woke up, he saw his sister naked with Maushim.
41. Under cross-examination, Afroz said in the year 2011, he was 9 years old and schooling at Class 3. He discussed about this case 2 months ago with his family. He is not in Court to save his father.

Analysis

42. There are two conflicting versions at the trial. The resolution of the dispute depends on whether the complainant told the truth in Court. The accused bears no burden to prove that he is innocent. The Prosecution must prove all elements of the charge beyond reasonable doubt. The case for the Prosecution will stand or fall on the testimony of the Complainant.
43. To prove the charge, the Prosecution substantially relies on the evidence of the complainant. To support the version of the complainant, the Prosecution tendered the DNA test result report prepared by the Scientific Officer of the Fiji Police Force. The defence of the accused is one of complete denial.

44. The complainant's evidence is that she was vaginally penetrated by the accused, who is her step father, with his penis, without her consent, six to seven times during the period between April and June 2011.
45. The Defence contended that the complainant is not a truthful witness. The position of the Defence is that the complainant made up this story to take revenge from her mother and stepfather and also to demand money from them. It advanced the theory that the complainant was having an affair with her stepbrother Maushim and he is the father of complainant's eldest child Mahammed Shiraz.

Delayed complaint/ charge

46. The alleged rape had taken place during the period between April and June 2011. The matter had been reported to police on 16 June 2016, approximately five years after the alleged incidents. The charge against the accused had been laid by police in May 2018, two years after the complaint. The defence contends that the belated complaint and the charge signify a false and fabricated allegation.
47. According to the complainant, she had in fact complained promptly to her mother-Nazreen who was in New Zealand at that time over the phone. She had also told Nazreen upon her arrival in Fiji after a stay of three months. Nazreen denies having received such a complaint. The question is whether the complainant's evidence on this particular point is credible in view of the conflicting versions advanced by the two contending parties.
48. According to the complainant, her mother Nazreen, had called, as usual, on the accused's telephone the day after the first incident. After talking to the accused, Nazreen had wanted to speak to the complainant. He had given the phone to the complainant. While the accused was engaged in something. Complainant had taken this opportunity to relay the rape incident to Nazreen. Nazreen had not believed her. Nazreen had told the complainant to keep quiet and had blamed the complainant for lying and falsely blaming her stepfather. Although the complainant had denied lying, her mother had not believed her.
49. Nazreen, the recipient of the alleged complaint, was called by the Defence. (Nazreen's evidence will be further analysed later in this judgment) She denied having received such a complaint. Instead, she had received a complaint from the accused that the complainant is having love bites on her neck, allegedly received from her step-son Maushim.
50. Complainant said she could talk to her mother on phone only twice after the first incident. Thereafter, Mustaq always took the phone with him and wouldn't keep the phone at home. She had no way to communicate with anyone as to what was going on at the house. There were no

neighbours in the vicinity as the stepfather's house was surrounded by his farm. The closest neighbour was her stepfather's brother whose house was situated quite a distance in a muddy area. To reach there, one has to cross the river which often got flooded. This evidence was not contradicted by the Defence.

51. The complainant was living with her stepfather under his roof. She was totally dependent on the accused for everything. She had nowhere to go. She was totally cut off from the society after the involuntary termination of her education. The youngest brother who was with her was small, attending Class 1. In the first alleged rape incident, the accused had forced himself on her and punched her. Although she did not say in so many words of her fear to inform anyone or report the matter to police, the situation she was in quite justifies her conduct in not making 'hue and cry' and not reporting the matter promptly to police.
52. The Defence contended that the complainant had not in her statement to police told about the complaint she had made over the phone to Nazreen. According to her previous statement, she had told the police only about the complaint she had made to Nazreen upon her arrival in June or July. That omission in her previous statement regarding the complaint made over the phone is justified in view of her explanation that the officer did not ask everything in detail while recording her statement. Furthermore, this omission is on a peripheral issue that would not amount to a contradiction as far as the rape allegation is concerned. On the other hand, if the rape incidents took place during the period between April and June, a complaint made in June or July cannot be considered as a belated one.
53. In view of that, this is not very much a case that lacks a recent complaint, rather a case allegedly lacking a 'credible' recent complaint. The fact remains that the police had received a complaint as late as 16 June 2016, approximately five years after the alleged incidents. Does the late complaint to police affect the credibility of the complainant's evidence?
54. Why was the matter not promptly reported to police, either by the complainant or by her mother? In the circumstances of this case, should the belated complaint to police and delayed charge justify an attack on complainant's creditability? Considering all the evidence led in this case, those are the questions that must be answered before coming to a conclusion as to the credibility of the complainant.
55. The complainant's explanation for not being able to report the matter to police is quite reasonable. When she was asked why did she not inform anyone else or report the matter to police, her explanation was that - *how can I expect anyone else to believe me when my own mother did not*

believe me when I told her that I was raped? The complainant's confidence in informing or reporting the matter to anybody else would have been shattered by the conduct of her own mother.

56. Why then Nazreen should have suppressed the matter? I can see two reasons for Nazreen to suppress the complaint received from her daughter. One relates to credibility and the other to reliability. The accused is none other than her husband on whom she is dependent for everything. Whereas the complainant from her perspective appears to be a discarded person. Nazreen would have wanted to prevent her husband from going to jail rather than to protect complainant's interests. In view of that, Nazreen must have had a strong motivation to prevent the matter being reported to police.
57. Even if Nazreen can be regarded as being credible on this point, upon the complainant's pregnancy having been confirmed, it would have been reasonable for her to entertain doubt as to the paternity of the child, if she had received the information that the complainant had been in an intimate relationship with her stepson Maushim. She would have been presented with a dilemma until this puzzling issue was resolved by scientific evidence with which I would deal later. Either of these reasons could have prevented Nazreen from reporting the matter to police. However, her insistence in her evidence attributing the paternity only to Maushim despite the presence of DNA evidence to the contrary compels me to doubt Nazreen's objectivity and sincerity. (Nazreen's evidence that she is not aware of the DNA test results cannot be true as the DNA report had been disclosed to Defence well in advance). In light of the circumstances discussed above, I am unable to accept the position of the Defence that there was lack of prompt complaint and that the belated complaint does signify falsehood. I find reasonable justification for the delayed complaint in this case.
58. The delayed charge is also justified in the circumstances of this case. After having received the complaint from the complainant, the police appear to have recorded statements from Nazreen and Maushim in which the paternity of the child had also been attributed to Maushim. In view of conflicting versions before them, the police investigators would have been presented with the same dilemma as that would have been presented to Nazreen as to the paternity of the child. As a reasonable police force, it is the responsibility for them to thoroughly investigate a serious allegation like this, before levelling a charge in court. To discharge that duty, they appear to have taken considerable time and DNA samples have been obtained from the two potential fathers, the mother and the child to ascertain the paternity of the child. The charge has been filed on 04 May 2018 after obtaining the DNA report on 25 April 2018. The delayed charge in my view does not affect the credibility of the version of events of the Prosecution.
59. The Defence counsel in his written submission has highlighted certain so called contradictions and omissions in the version of the complainant. None of them in my opinion are material enough to discredit the version of the complainant. The complainant has never suppressed in her evidence-in-

chief that she had two children with her ex-husband Suliasi. She, in her previous statement had stated that she was punched on her ribs twice and slapped. In her evidence she said she was punched on her ribs and head. There is no contradiction there. She had told the police that she had cried although there was no mention of yelling or shouting. Again there is no contradiction. There is no inconsistency in her evidence as to who supplied information to the Registry of Births. Although she once said Suliasi's sisters were talking to the doctors and nurses at the hospital, she categorically said that she played no part in providing information for the preparation of the birth certificate which had been done much later. She has come to know about the birth certificate only when the maintenance claim was made by Suliasi in 2017 or 2018. The date of registration on the birth certificate (14 Jan 2016) (DE2) confirms complainant's evidence.

60. As to the purported motive to fabricate a false allegation, two propositions were advanced by the Defence. They say the complainant made up this allegation to demand money from Nazreen and the accused and also to take revenge on them. Where is evidence? None of these propositions were substantiated by the Defence. Nazreen in her evidence never said that the complainant demanded money either from her, the accused or Maushim to refrain from complaining. She only talked about the maintenance claim filed in court against the accused. Complainant admitted that she demanded \$ 92,000 in her maintenance claim from the accused from the date of the birth of the child and that this application was struck out for her non-appearance in court.
61. The complainant flatly denies that she made this allegation to get revenge from her mother and the accused. It was the proposition of the Defence that the complaint was lodged with police to take riving on Nazarene and Mustaq because Nazreen kept on coming to Lalel's Supermarket to pass irritable comments on her. Nazreen in her evidence never mentioned about her ever coming to Lalel's Supermarket. Complainant had gone to police to prevent untruthful comments being passed by Suliasi's sisters. The rape allegation has come to light in the process of questioning by the police. Therefore, I am unable to accept that the complainant had an ulterior motive to make up a false allegation.
62. It was suggested that Vaivi house had three bed rooms and accused's father was also living in that house during the period the alleged incidents were taking place and that the complainant never slept in the accused's bedroom and that it was not possible the incidents to happen when her youngest brother Afroz was also sleeping in the same room. The photograph tendered by the Prosecution confirms that there are two beds in that room arranged in L shape. There is no mention in Nazreen's statement that accused's father was also living in that house. The incidents had occurred late night when Afroz was fast asleep. He was small child of 7 years old. It is not improbable those incidents to happen in that setting.

63. The Complainant's evidence is straightforward and not evasive. There are no material inconsistencies or contradictions in her own evidence. None of the so called contradictions and omissions highlighted by the Defence Counsel in his closing submission are material to the main issue at the trial. The complainant's manner of giving evidence prevents me from treating her as a dishonest and untrustworthy witness. Having considered the overall evidence of the Complainant, and her demeanour, I am of the view that the Complainant was telling the truth in Court.
64. I must now deal with the scientific evidence which was tendered to support the version of the Prosecution. It is the case for Defence that the father of complainant's child Mohammed Shirz, /Shihhab is not the accused but his son Maushim. According to the birth certificate (DE2), the child was born on 06 February 2012. The alleged rape incidents had taken place from April to June 2011. The date of birth is consistent with complainant's evidence that she was penetrated by the accused six to seven times during the period mentioned in the information.
65. There is no evidence that the complainant was having sexual intercourse with a person other than the accused during the time the child supposed to have conceived. Even if the evidence of Afroz that he saw complainant naked in Maushim's bed were accepted, that does not prove that Mashim has had sexual intercourse with the complainant. Activities like mouth to mouth kissing or making love bites or touching that Nazreen described certainly will not be sufficient to make a woman pregnant. Therefore, the DNA evidence plays a crucial part in the Prosecution case.
66. To bolster the Prosecution case and to confirm the paternity of the child, the Prosecution tendered the DNA test results report (PE2) (DNA Report) dated 25 April 2018 and called the Nacanieli Gusu, the Scientific Officer of the Fiji Police Force Forensics Biology Lab. This report had been disclosed to the Defence well in advance. There had been no challenge to the admissibility of the report at the pre-trial conference and the Defence had even agreed that it could be tendered as an agreed document. However, the last minute amendment to the information by the DPP's office, prompted the Defence to withdraw that admission. The amendment proposed to amend only the period in which the offence was alleged to have been committed. Defence was given ample time to prepare for the defence and to meet the amended charge so as to avoid any prejudice that may be caused although the amendment could have no effect on the test results already disclosed.
67. The Scientific Officer Nacanieli Gusu giving evidence on the analysis done on the DNA samples extracted from the child Mohammed Shiraz, the accused, the complainant and Moushim Ali confirmed that the child is a biological child of the accused and the complainant. He explained the three tire process of his testing, analysis and matching and the machines used to come to that conclusion. He has come to that conclusion on the basis of the test result that the mother of the child and Mustaq Ali each equally contributed towards the child's DNA. He categorically ruled out the

possibility that Maushim Ali could be the father of the child. This conclusion has been reached on the basis that DNA of the child did not match on all 28 locations of Moushim Ali's DNA. It only matched at 19 locations.

68. The Defence Counsel submits that the report presented by the Scientific Officer is not accurate because the officer did not find out the paternity index of the alleles in the report and that he was not aware of the formula of finding out probability of parenting.
69. There is no basis either scientific or evidential for this argument. The attack on DNA report is purely advanced on a submission of a legal counsel from bar table who has done his own research. The report was disclosed to the Defence well in advance and if they wanted to challenge this report, they could have called another expert on this science or field of expertise and produce evidence to counter the findings of the DNA report. Therefore, I reject the argument of the Defence and accept the DNA test result report as being accurate. It provided a strong support for the evidence of the complainant.
70. The Defence is not burdened to prove anything in this case. Even though I prefer the evidence for the Prosecution, I must not convict unless I am sure beyond reasonable doubt of the truth of that evidence. Therefore it is incumbent upon me to analyse the evidence of the Defence to see if a reasonable doubt has been created in the Prosecution case.
71. The Defence called Nazreen Nisha. Nazreen's evidence is not appealing to me. It is filled with improbabilities infirmities. She is the wife of the accused as well as the mother of the complainant. Where does her loyalty lie? From the beginning of her evidence she demonstrated how keen she was to defend her husband while putting her own daughter in an embarrassing situation. Nazreen did not count Nisha as her child when asked how many children she has. That shows how distant she had been from her daughter. The negative attitude towards her daughter compels me to treat Nazreen as a bias witness in favour of the accused.
72. I have already explained why Nazreen's evidence on the lack of complaint should not be believed. Further to that I would say these. There is no dispute that complainant's education came to an abrupt end when she was brought to Nazreen's house. Complainant's version is that her grandfather was initially reluctant to send her to her mother but later agreed because her mother promised to continue with her education. However, upon her custody being obtained, her mother did not want to keep that promise because she preferred to please her husband who demanded a halt to her education. Nazreen's evidence is that Nisha was not sent to school because of her bad behaviour of which her grandfather had advised. Assuming that Nazreen is telling the truth, is that a good reason for a caring mother to stop the education of a child? The suggestion that Nisha was expelled from her former

school, which suggestion Nisha denied, was never supported by the Defence although they signalled that they could bring evidence from the head master to prove the expulsion.

73. According to the complainant, she had been taken to Lautoka Hospital when her mother came to know that her menstruation had stopped. The doctor who inspected her at the hospital had confirmed that she is pregnant. After that she was taken to another doctor in Matintar to abort the child. An abortion was not possible because the child was big. Then she was taken to Nazar's house after a telephone conversation. Nazar is a cousin of the accused. Nazar was convinced to keep the complainant until the child was born. The arrangement was that Nazar's son Suliasi to be the father of the child and the complainant to be the wife.
74. According to Nazar, The complainant was taken to hospital because she was complaining of a side pain. Then why the doctor made a comment on her menstruation? Pregnancy test is a simple one that can be done in any hospital. I am unable to comprehend why the complainant was taken to a gynaecologist to double check if she was not pregnant. I accept the evidence of the complainant that her pregnancy was confirmed at the Lautoka Hospital and the second visit to a doctor in Matintar was to explore the possibility of an abortion.
75. Nazreen's attitude towards the complainant is clearly manifested from her conduct during complainant's pregnancy. When she learnt that Nisha is pregnant she took her to Nazar's house in Nadele about two hour drive from Lautoka. Nazreen's explanation is that since the river near her house often got flooded, Nazar's house was safer and also convenient for hospital visits. It is hardly believable that a river in Lautoka got flooded very often during that season. The Hospital is based in Lautoka and I don't think that the hospital visits are easier from Nadele, which involve a travel of almost two hours. On top of that what more protection a pregnant daughter could expect from an outsider than from her own mother.
76. Complainant's evidence is that she was not taken to the hospital for the delivery because they (her mother, stepfather and Nazar) wanted to keep everything under the carpet. Her evidence is consistent with what actually happened during her pregnancy. There is no point in visiting a private doctor in Matintar when the pregnancy has already been confirmed at the Lautoka Hospital. It is plausible that the Matintar visit was aimed at an abortion. When the attempt at abortion failed, the complainant was sent to Nazar's house. The delivery took place at Nazar's house, not in the hospital.
77. The version of the Defence on this point is highly implausible. To justify their claim that the complainant was sent to Naza'r house for daughter's own safety, Nazreen appears to have made up a story. According to her, she has received a call from Suliasi, asking her to take Nisha back. Then, they had brought Nisha back. The very next day Nisha had developed pains and got admitted to

Lautoka Hospital for delivery. Whilst in the hospital, Nisha had run away with Suliasi from the hospital. It is not plausible that a pregnant woman who is about to deliver a child would run away from hospital with a person who had already refused to live with her. Nazreen also said that she reported the matter to police. Why would she report Suliasi to police when he has already agreed to be with her daughter and be the father of the child.

78. I consider Suliasi to be a 'surrogated father'. His evidence is highly implausible. According to him, Nisha was entrusted to his mother not because of her pregnancy but her house got often flooded. Having agreed to be the father of complainant's unborn child, he starts fighting with her and sends her back home. On the very next day he comes to know that this estranged woman is hospitalised to deliver her baby. He goes to the hospital and runs away with this woman who was about to deliver a baby and makes her deliver the baby at home. Suliasi marries the complainant three years after the delivery of her first child and even after her third child was born. Without any knowledge of the complainant he goes and register the birth certificate of the first child in 2016 putting his name as the father approximately four years after the birth of the child.
79. I see Suliasi as the superstar of a drama produced according to a script written by the accused and his wife Nazarene to put the truth under the carpet. I wholeheartedly reject his evidence.
80. Afroz Ali is the youngest son of the accused. He showed himself to be an interested witness in the Defence case although he said he is in Court not to save his father. He is 19 years old and, when the alleged incidents happened in 2011, he should have been 7 years old. Complainant said he was attending Class 1. However, Afroz insisted that he was 9 years old, attending Class 3 in 2011. If that is the case, I don't think he needed his sister's assistance to go to the washroom as he claimed. Being a child of 7 at that time, I don't think he could recollect, after almost 12 years, how his sister had been sleeping with his bother on the same bed. There is no evidence that he has given a statement to police about what he said in Court. I reject his evidence.
81. I accept the version of events of the case for Prosecution and reject that of the Defence.
82. Being satisfied with the credibility of the version of the Prosecution, I must see if all the elements of Rape as charged have been satisfied. There is no dispute as to the identity of the accused. The Prosecution proved that it was the accused that had penetrated the complainant with his penis. The complainant said that the accused inserted his penis into her vagina on each occasion. Accused forced himself on the complainant and punched her. There is clear evidence that the complainant did not consent to sexual intercourse. I am satisfied that the sexual intercourse was not consensual. When the accused was being pushed and resisted he must have known that the complainant was not

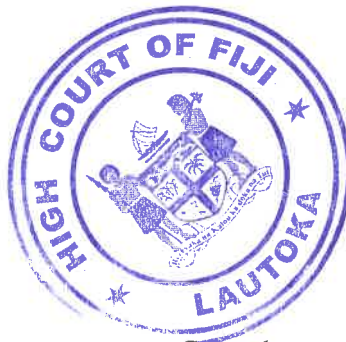
consenting to a sexual intercourse. The fourth element of Rape is also satisfied. The offence of Rape as charged is made out.

83. Prosecution has proved all the elements of the offence of Rape beyond reasonable doubt. I find the accused guilty of Rape. The accused is convicted accordingly.



Aruna Aluthge
Judge

25 January 2023
At Lautoka



Counsel:

- Office of the Director of Public Prosecution for State
- Roneel Kumar Lawyers for Defence