

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 76 of 2022

STATE

vs.

MOHAMMED IFTIKHAR ALI

Counsel: Ms. J. Fatiaki for the State
Mr. J. Reddy with Ms. S. Narayan for Accused

Date of Hearing: 24th, 25th and 26th July 2023

Date of Closing Submission: 31st July 2023

Date of Judgment: 15th August 2023

JUDGMENT

Introduction

1. The name of the Complainant is suppressed and hereby referred to as **AB**.
2. The Acting Director of Public Prosecution, by Amended Information filed on the 5th of June 2023, charged the Accused, Mr. Mohammed Iftikhar Ali, with one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Rape, contrary

to Section 207 (1) and (2) (b) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are:

COUNT 1

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

MOHAMMED IFTIKHAR ALI on an unknown date between the 1st of August 2020 and the 31st of August 2020, at Lulu Place in Davuilevu, in the Eastern Division, unlawfully and indecently assaulted **AB** by touching her breasts.

COUNT 2

Statement of Offence

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

Particulars of Offence

MOHAMMED IFTIKHAR ALI on the same occasion as in Count 1, penetrated the vagina of **AB** with his finger without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

MOHAMMED IFTIKHAR ALI on the same occasion as in Count 1 and 2, had unlawful carnal knowledge of **AB** by inserting his penis into her vagina without her consent.

3. Consequent to the plea of not guilty entered by the Accused, the matter proceeded to the hearing. The hearing commenced on the 24th of July, 2023 and concluded on the 26th of July, 2023. The Prosecution presented the evidence of eight witnesses, including the Complainant, and tendered twelve documents as Prosecution's exhibits. The Accused gave evidence and called three other witnesses for the Defence. Subsequently, the Court heard the closing submissions of the learned Counsel for the Prosecution and the Defence. In addition to their respective oral submissions, both parties filed written submissions. Considering the evidence presented during the hearing and the respective oral and written submissions of the parties, I now proceed to pronounce the judgment.

Prosecution's Evidence

4. The Prosecution alleges that on an unknown date between the 1st of August 2020 and the 31st of August 2020, the Accused unlawfully and indecently touched the breasts of the Complainant when she came to play with his daughter at their home. The Complainant was 14 years old in 2020 and living in a house with her family next to the Accused's house. On that particular day, the Complainant had gone to the Accused's place to play with his daughter as the schools were closed due to the Covid 19 lockdown. While she was playing with the Accused's daughter, the Accused had asked his daughter to go and bring something from the shop. Once his daughter left home, the Accused approached the Complainant while she was in the sitting room and started to touch her breast over her clothes. He then removed her pants and undergarment, putting her on the settee in the living room. He then began to touch her vagina with his fingers. After that, the Accused penetrated the vagina of the Complainant. The Complainant testified in her evidence that she did not like what he did. She felt uncomfortable. When the Accused penetrated her vagina with his penis, the Complainant was lying on the settee, and the Accused was

holding her hands tightly. While penetrating her vagina with his penis, the Accused saw his daughter returning from the shop. He then stopped it and put her dress down. He threatened the Complainant in a terrifying manner, saying not to tell anyone.

5. Once the daughter of the Accused came, the Complainant told her that she was going home and left the Accused's place. The Complainant had not related this incident to anyone because she feared the Accused. Besides that, she thought her mother would get angry if she told her about this incident. In February 2021, she was taken to a doctor by her mother as she was feeling unwell, and the Doctor found that she was six months pregnant. Once it was revealed, the Complainant told her mother about this incident. The matter was then reported to the Police.
6. The Complainant eventually gave birth to a child on the 17th of May 2021. Afterwards, the Police conducted a DNA test to test the child's paternity. On the 31st of January 2022, the Police uplifted the child's buccal sample and the Complainant's buccal sample was uplifted on the 14th of February 2021. IP Patricia Liga had uplifted the buccal swab of the Accused on the 15th of October 2021. Subsequently, a DNA test was conducted, and the report was tendered in evidence as Prosecution's exhibit twelve. According to the DNA Analyst Report, the child's father is the Accused.

Defence's Evidence

7. The Accused denies this allegation, stating that he never met the Complainant in August 2020 as he was at work during the whole month except Sundays. Moreover, the Accused claims that his family has no close relationship with the Complainant's family since the two families had a dispute over the house built by the Complainant's family near the Accused's home. Since that dispute, neither the Accused nor the Complainant's family visited each other's places. The Accused's wife and daughter gave evidence, stating that the Accused was at work during August 2020. Furthermore, the Accused's wife and daughter testified that they were home in August 2020 and never left home. Despite the evidence of the Accused, his wife and daughter, claiming the Accused was at work during

August 2020, the mother of the Accused stated the opposite, saying that the Accused was at home in August 2020 due to the Covid lockdown.

The Admitted Facts

8. The Accused tendered the following admitted facts pursuant to Section 135 of the Criminal Procedure Act.
 - a) *THAT the person charged in this case is Mohammed Ifrikar Ali [hereinafter referred to as "Mohammed"] who was 38 years old at the time of the alleged offending.*
 - b) *THAT the complainant in this matter is AB [hereinafter referred to as Ms. AB"] who was 14 years old at the time of the alleged offending.*
 - c) *THAT during the time of the alleged offending that is, sometime between the 1st day of August 2020 and the 31st day of August 2020, as per the Information filed for this matter, Ms. AB was living with her family in their own house at Lulu Place, in Davuilevu, in the Eastern Division.*
 - d) *THAT Mohammed and Ms. AB are neighbours at Lulu Place Davuilevu.*
 - e) *THAT Mohammed has children, including a daughter who was about 10 years old in August of 2020.*
 - f) *THAT Mohammed was living in a house that was next to Ms. AB's house.*
 - g) *THAT on the 15th of October 2021 at Vanua Arcade in Suva, Police Officers, obtained buccal swabs from Mohammed for purposes of DNA testing in connection to this criminal case.*

- h) **THAT** the existence of the Fiji Police Force Medical Examination form of Ms. AB dated 5th of February 2021 is not disputed.
- i) **THAT** the existence of Forensic DNA Report pertaining to the biological parents of the baby Aarav Prasad is not disputed.
- j) The following documents can be tendered by consent:
 - i) Consent Reference Form for DNA collection for Aarav Prasad.
 - ii) Consent Reference Form for DNA collection for AB.

The Additional Admitted Facts

- k) **THAT** Salome Apole on the 31st day of January 2022 uplifted the buccal sample baby Aarav Prasad and handed over the same to Thompson Daurewa at the Fiji Forensics Science Service Lab at Nasova on the same date.
- l) **THAT** an Analyst Form was thereafter filled out containing the relevant details in relation to the handing over of the baby's sample.
- m) **THAT** the form is tendered by consent as a Prosecution Exhibit.
- n) **THAT** Eta Kedrayate on the 14th of February 2022 uplifted the buccal sample of AB and handed over the same to Nacanieli Gusu at the Fiji Forensics Science Service Lab at Nasova on the same date. That an Analyst Form was thereafter filled out.
 - a) **THAT** the form is tendered by consent as a Prosecution Exhibit.

Burden and Standard of Proof

9. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty.
10. The standard of proof in a criminal trial is "proof beyond reasonable doubt". It means that the Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt. In this case, the Accused raised the Defence of alibi. It means he claims he was elsewhere when the alleged offences occurred.
11. Even though the Accused have put forward the Defence of alibi, the burden of proving the case against the Accused beyond a reasonable doubt remains on the Prosecution. The Prosecution must prove that the Accused was present at the crime scene and committed these three offences as charged in the information.

Elements of the Offences

12. The main elements of the offence of Sexual Assault are that:
 - i) The Accused,
 - ii) Unlawfully and Indecently,
 - iii) Assault the Complainant.
13. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is the onus of the Prosecution to prove that the Accused had unlawfully and indecently touched the breast of the Complainant beyond reasonable doubt.

14. The main elements of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act are that:
- i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his fingers,
 - iii) The Complainant did not consent to the accused to penetrate her vagina with his fingers,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his fingers in that manner.
15. The main elements of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act are that:
- i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his penis,
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his penis,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.
16. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed these offences to the Complainant. There is no dispute about the identification. The Accused and the Complainant are known to each other as neighbours. The dispute is whether this alleged incident happened involving the Accused.
17. Evidence of the slightest penetration of the vagina of the Complainant with the fingers and penis of the Accused is sufficient to prove the element of penetration in respect of counts two and three, respectively.

18. I shall now briefly discuss the element of consent. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
19. The Complainant must have the freedom to make a choice. It means she must not be pressured or forced to make that choice. Moreover, the Complainant must have the mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
20. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his fingers/penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.

Evaluation of the Evidence

21. Having discussed the main elements of these offences, I shall now proceed to evaluate the evidence with the applicable law. In doing that, the Court must first look into the credibility or the veracity of the evidence given by the witnesses and then proceed to consider the reliability or accuracy. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant.

(vide; *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, *State v Solomone Qurai* (HC Criminal - ILAC 14 of 2022),

22. I first draw my attention to the evidence of the Defence, which encompasses two components. The first component is the Defence of Alibi, stating that the Accused was not present at home in August 2020. The second component is that the Complainant never visited the Accused's house during August 2020.
23. The Accused is not required to give evidence. He does not have to prove his innocence as his innocence is presumed by law. However, in this case, the Accused decided to give evidence and also presented the evidence of three witnesses. Therefore, such evidence presented by the Defence needs to be considered when determining the facts of this case.
24. Lord Reading CJ in *Abramovitch* (1914) 84 L.J.K.B 397 held that:

"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases: it always remains on the prosecution."

25. Accordingly, if the Court believes the evidence given by the Defence is true or may be true, then the Court must find the Accused not guilty of these offences. Even if the Court rejects the Accused's version that does not mean that the Prosecution has established that the Accused is guilty of the crime. Still, the Prosecution has to satisfy that it has established, on its own evidence, beyond a reasonable doubt, that the Accused committed these offences as charged in the information.

DNA Evidence

26. The DNA Analysis Report states that the Accused is the father of the Complainant's child, born on the 17th of May 2021. The Accused challenged the accuracy of the result of the DNA Test, alleging the possibility of contamination of the buccal swab sample obtained from him. In doing that, the learned Counsel for the Defence argued that the integrity of the chain of custody of the Accused's buccal swab sample from the point of uplifting to the test was not established by the Prosecution.
27. The Supreme Court of Fiji in Chand v State [2012] FJSC 6; CAV0014.2010 (9 May 2012) discussed the importance of the procedure of testing and the result of DNA analysis, where Marsoof JA said that:

"[54]Since the introduction of the DNA fingerprinting technique, the use DNA of evidence has been widely accepted across the world. For decades, the authority for admissibility of scientific evidence was the case of Frye v United States 293 F. 1013 (1923) in which the Court observed that "while Courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

55] Although DNA evidence has generally been acted upon in judicial decisions since then, it must be stressed that DNA evidence would not always be admissible, especially when a party offers expert testimony challenging the reliability of the procedures or the results. On one side of the line are decisions such as Spencer v. Commonwealth, 384 S.E.2d 775 (Va. 1989) where the Court held that DNA testing is a reliable scientific technique, the laboratories involved had performed the tests properly, and that there was no challenge as to reliability by the defense, the DNA evidence would be admissible. On the other side of the line are cases such as State of Minnesota

v. Schwartz N.W, 2d 422 (Minn. S.C., 1989), where the Court emphasized that reliability of the results was crucial, and citing the high error rate of a particular laboratory, the Court asserted that DNA tests were only a reliable as testing procedures used by the laboratory conducting them. It is equally important to establish the chain of custody of the blood samples that produced the DNA evidence. In Daubert v. Merrell Dow Pharmaceuticals, Inc. [1993] USSC 99; 509 U.S. 579 (1993), the Court held that the Judge would assume the role of 'gatekeeper' and ensure that any scientific evidence that was admitted was not only relevant to the issue at hand but was also reliable.“

28. According to the Admitted Facts tendered pursuant to Section 135 of the Criminal Procedure Act, the Accused admitted that the Police Officers came and obtained his buccal swabs for DNA testing on the 15th of October 2021, at Vanua Arcade, where he works as a barber. IP Patricia Liga testified, confirming that she uplifted the Accused's buccal swab on the 15th of October 2021 at his workplace at Vanua Arcade.
29. Departing from his admission under Section 135 of the Criminal Procedure Act, the Accused claimed in his evidence that his buccal sample was obtained at the Totogo Police Station and not at his workplace. However, he admitted that he had filled his name and date in the Consent Form. He further admitted that he made a mistake in filling out the Consent Form but claimed that the Officer should have corrected him if he made a mistake. The Accused did not provide any explanation for the inconsistent nature between his evidence in Court and the Admitted Facts tendered under Section 135 of the Criminal Procedure Act regarding the date and place of the collection of his buccal swab sample, thus affecting the credibility of his evidence in this regards. Under such circumstances, I accept the evidence of IP Patricia Liga, which the Accused also admitted under Section 135 of the Criminal Procedure Act and conclude that the Accused buccal swab sample was collected on the 15th of August 2021 at Vanua Arcade, Suva, by IP Patricia Liga.
30. IP Patricia Liga explained, in her evidence, the procedure of taking the buccal swab and submitting it for testing. She explained the procedure and his rights before taking his

samples to the Accused. Once the Accused signed the Consent Form, IP Liga used the DNA Test Kit to obtain his buccal swab from his mouth. Once the sample was obtained, it was properly sealed in the envelope with the Consent Form and handed over to WPC Jiko at the Police Biology and DNA lab on the same day. The Police use a DNA Test Kit only for one person, and such a Kit has its unique number. IP Liga is an experienced and qualified Officer who has served 18 years in the Police Forensic Science Service.

31. The Prosecution presented the evidence of WPC Jiko to establish that she received the buccal swab sample of the Accused from IP Liga at the Biology and DNA lab on the 15th of October 2021 and then stored it safely for testing. WPC Jiko had checked and completed all the documentations process for submitting and storing the Buccal Swab samples.
32. Mr. Nacanieli Gusu is a Scientific Officer at the Forensic Science Service with eight years of experience. He obtained a Bachelor of Science majoring in Biology and Chemistry from the University of the South Pacific in 2013. He attended training on how to carry out forensic examination and forensic DNA analysis. He had carried out the DNA testing of the Accused, the Complainant and the Child to determine the Child's biological parents. Mr. Gusu explained the procedure of submission of the sample and their storage at the lab, which is done in order to maintain the quality and integrity of the process.
33. In his evidence, Mr. Gusu explained in detail the three stages of the test he carried out to obtain the DNA analysis of the three samples pertaining to the Accused, the Complainant and the Child. Afterwards, he outlined the DNA profile comparison, where he found the twenty-four DNA locations of the three samples matched apart from location 10, which only matched the samples of the Child and the Complainant but not the Accused. Mr. Gusu explained the reasons for this mismatch, stating it is a result of mutation and does not affect the accuracy of the conclusion. During the cross-examination by the learned Counsel for Defence, Mr. Gusu specifically stated this mismatch does not make the conclusion inaccurate. According to him, the final result that confirms the Accused is the biological father of the Child is conclusively accurate. According to Mr. Gusu, mixing up

the samples at the laboratory and the testing process is impossible. They have employed a proper quality control system with a second person who constantly witnesses and reviews the testing process.

34. Moreover, he explained the terminology used in stating the conclusion. In paragraph 1.4 of the DNA Report, Mr. Gusu stated that the Accused cannot be excluded as the biological father of the Complainant's child.
35. The Court of Appeal of England in **R v Dawson (81 Cr App R 150 CA at 153, 154)** found that the direction given by the learned trial Judge based on the **Bracewell directions (1979) 68 Cr. App. R 44 at 49)** on evaluating the Doctor's evidence and the distinction between the scientific and legal proof was correct. The directions given by the trial Judge in **R v Dawson (supra)** have a significant persuasive value and could be adopted *mutatis mutandis* to the evidence given by Mr. Gusu, which I reproduce below.

"You must remember this, that a doctor, and you may have thought that Dr Green was a splendid example of fairness, is speaking from a scientific point of view. He was saying, 'I cannot as a scientific certainty rule out that which you postulate, namely partial asphyxia, recovery and then a heart attack,' but, he said, 'I incline strongly against that view.' You will remember ladies and gentlemen that your duty is not to judge scientifically or with scientific certainty. You judge so that as sensible people you feel sure and even say that what might not satisfy Dr. Green as a scientific certainty, might, with propriety, satisfy you so that you felt sure. Do not be misled. There is no such thing as certainty in this life, absolute certainty. You ask yourselves the simple question upon the whole of the evidence do I feel sure? Take account of course of the doctor's evidence. It is the most important evidence on this aspect. He is really the only one qualified to speak here. Take account of his reservation fully. That direction, in our judgment, correctly draws the distinction between what might be described as scientific proof on the one hand and legal proof on the other. It is, with respect, an admirably lucid and

succinct way of dealing with a problem which often arises in connection with scientific evidence. It is, of course, part of cross-examining counsel's duty to invite expert witnesses to consider alternative hypotheses and, after examining them in detail, to conclude by asking, 'Can you exclude the possibility?' 'The available data may be inadequate to prove scientifically that the alternative hypotheses is false, so the scientific witness will answer, 'No, I cannot exclude it,' though the effect of his evidence as a whole can be expressed in terms such as, 'But for all practical purposes (including the jury's) it is so unlikely that it can safely be ignored.' This is in substance what Dr. Green said."

36. Accordingly, Mr. Gusu's finding of the paternity of the Child is founded on a scientific analytical comparison of the DNA profiles obtained from the Accused, the Complainant and the Child. Hence, he concluded that the Accused cannot be excluded as the biological father of the Complainant's child. As expounded in **Dawson (supra)**, the Court is not obliged to conclude that the Accused is the Child's father based on the opinion of "cannot be excluded" given by Mr. Gusu. If then, there is no purpose in giving this Court the jurisdiction to adjudicate the facts of the dispute. Indeed, the scientific opinion of Mr. Gusu has the most significant importance. However, the Court needs to make its judgment on the whole of the evidence presented during the hearing, including Mr. Gusu's evidence and the result of the DNA Analysis Test.
37. The Defence cross-examined IP Liga, Cpl Jiko and Mr. Gusu, asking questions regarding collecting, submitting and testing DNA samples. However, the Defence failed to adduce or point out any evidence to create any doubt about the integrity of the chain of custody and/or the testing procedure of this DNA Analysis Test.
38. Considering the reasons discussed above, I find the Prosecution has successfully established the integrity of the collection process of the Accused's buccal swab sample and then the chain of custody of the same from the point of collection to the testing beyond

a reasonable doubt. Thus, I accept the DNA Analysis Report as true, credible, and reliable evidence.

Evaluation of the Defence's Evidence

39. The Complainant was confronted by her mother at the Doctor's clinic when they found she was six months pregnant in February 2021. She responded, stating that the Accused had sexual intercourse with her on an unknown day in August 2020. According to Doctor Burua's and Nileshwari Bandana's evidence, the Complainant was six months pregnant in February 2021 and then gave birth to the Child on the 17th of May 2021.
40. Accordingly, the Court could form an indisputable inference from the evidence stated in the above paragraph that the Complainant had sexual intercourse with someone in August 2020. Considering her evidence that the Accused had sexual intercourse with her in August 2020 and the DNA Analysis Report not excluding the Accused as the biological father of the Complainant's child, the Court could safely form a further indisputable and undeniable inference that the Accused had sexual intercourse with the Complainant in August 2020.
41. Accordingly, I find the evidence of the Accused stating that he never met the Complainant in August 2020 is false and not true. Furthermore, I hold the Accused's evidence that he did not engage in sexual intercourse with the Complainant is untrue. I will discuss in detail the probative value of the DNA Analysis Report in respect of the evidence of the Complainant in a while.
42. The Complainant's mother testified in her evidence that the Complainant stayed at home during August 2020 as the schools were closed due to the Covid lockdown. Even though the mother went to work as a housemaid, the Complainant remained at home. This evidence was not challenged or suggested otherwise by the Defence. Therefore, this undisputed evidence establishes that the Complainant was at her home at Lulu Place, Davuilevu, in August 2020. Hence, the Court could safely conclude that the above-proved

sexual intercourse between the Accused and the Complainant in August 2020 occurred in Lulu Place, Davuilevu, in August 2020.

43. The above conclusion leads to another undisputed inference that the Accused was not at work at that particular time when he engaged in that sexual intercourse with the Complainant in August 2020 at Lulu Place, Davuilevu. Based on the said conclusion, I find the Accused's evidence that he was at work during August 2020 except Sundays is untrue. Moreover, I find the evidence of his wife and daughter stating that the Accused was not at home but at work during August 2020 is not true either.
44. The Defence presented the evidence of the Accused and his family members stating that the Complainant or her family members never visited their house after the dispute over the construction of the Complainant's family house that took place two years before 2020. According to the Complainant's mother, they initially lived in an old house but started building a new home recently, which was after 2020. She accepted that the father of the Accused had issues with the construction of the new house but not the Accused and his other family members. The Complainant's family recently moved to their new home and spent only one Diwali in the new house.
45. According to the Defence witnesses, the Complainant's family moved to the neighbourhood ten years ago. The Accused said they built a house and moved in, indicating that the new home was made ten to eight years ago. If the Complainant's family moved to the neighbourhood after building a house, then it is not possible to have a dispute over the construction of a house two years before 2020. Moreover, the Accused's daughter, after she was confronted with the Statement she had given to the Police, admitted during the cross-examination by the learned Counsel for the Prosecution that the Complainant used to come to her house to play with her. I accordingly refuse to accept the evidence of the Accused, his wife, his mother and his daughter on the issue that the Complainant's family had a dispute with them; therefore Complainant never visited the Accused's house.

46. Taking into consideration the above-discussed reasons, I hold the Defence of alibi raised by the Accused is untrue and cannot be accepted. Moreover, the Defence of alibi raised by the Defence has failed to create reasonable doubt about the Prosecution's case. Furthermore, I find the claim of the Defence that the Complainant had never visited the Accused house during August 2020 is false and untrue.
47. Even though I reject the Defence of alibi raised by the Accused and the claim of the Defence that the Complainant never visited the Accused's house in August 2020, that does not mean that the Prosecution has established that the Accused is guilty of these offences. Still, the onus is on the Prosecution to establish on its evidence beyond reasonable doubt that the Accused committed these offences as charged in the Information.

Evaluation of Prosecution's Evidence

48. I shall now proceed to determine the credibility and reliability of the Complainant's evidence. In doing that, I first draw my attention to determining whether the delay in reporting this matter affected the credibility and reliability of the Complainant's evidence.
49. Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014 (the 4th of October 2018)** has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution's case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
50. The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence if there is an unsatisfactory explanation for the delay or unexplained delay. (vide; **Masei v State [2022] FJCA 10; AAU131.2017 (3 March 2022)**)

51. The Complainant was 14 years old in 2020, and the Accused is an elderly neighbour who resides very close to her house. She explained the reason for not telling of this incident to anyone. The Complainant was scared of the Accused and his threat. It was her pregnancy that forced her to reveal about this incident. Considering her young age and the proximity of the Accused in her neighbourhood, the explanation given by the Complainant is acceptable; hence, the delay in reporting has not affected the credibility and reliability of her evidence.
52. The mother's evidence contains two main components. The first component is the evidence of recent complaint. The second component is evidence of facts regarding the pregnancy of the Complainant and the dispute with the Accused's family over the construction of her new house.
53. The evidence of recent complaint is not evidence of the fact that could corroborate the Complainant's evidence, but they are relevant to the issue of consistencies in the conduct of the Complainant; hence, they link to the issues of credibility and reliability of the Complainant's evidence. (*vide Gates CJ in Raj v State [2014] FJSC 12; CAV0003.2014 (the 20th of August 2014)*). It is sufficient to disclose some material about the unlawful sexual abuse and not required to explain all the ingredients of the alleged sexual conduct. (*vide Raj v State (supra)*).
54. The Complainant's mother specifically explained that the Complainant relayed her that the Accused had sexual intercourse with her, making her pregnant. I accordingly find the evidence of the recent complaint consistent with the evidence given by the Complainant.
55. The Defence never raised the issue of consent, but the complete denial, saying that this incident never happened. The Complainant, in her evidence, specifically stated that she did not like what the Accused did to her on that day, whereby establishes that she did not consent to the Accused to penetrate her vagina with his penis.

56. Considering the DNA Analysis Report, evidence of Doctor Losana Burua, Ms Bandana and the Mother of the Complainant as a whole with the evidence given by the Complainant, I find the Complainant's evidence is credible and reliable; thus, accept the same as the truth. Accordingly, I am satisfied that the Prosecution has proved beyond reasonable doubt that the Accused unlawfully and indecently touched her breast and then penetrated her vagina with his penis without her consent.
57. The Complainant only stated that the Accused touched her vagina with his finger. Hence, no specific evidence exists to establish whether he penetrated her vagina with his fingers. Accordingly, the Prosecution failed to establish the second count of Rape, that the Accused penetrated the vagina of the Complainant with his fingers without her consent. However, the Prosecution established beyond reasonable doubt that the Accused had sexually assaulted the Complainant by touching her vagina with his fingers. Accordingly, the Prosecution has proved that the Accused committed a lesser offence of Sexual Assault by indecently and unlawfully touching her vagina with his fingers.
58. In conclusion, I find the Accused guilty of two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and convict of the same accordingly.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe", written over a dotted line.

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

15th August 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Jiten Reddy Lawyers for the Accused.