

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

**CRIMINAL CASE NO: HAC 74 of 2019**

**STATE**

**V**

**ABDUL ASHFAT ALI**

**Counsel** : Ms. Saini Naibe for the State  
Ms. Benita Kumari with Ms. Manisha Devi for the Accused

**Dates of Trial** : 8-10 August 2023

**Closing Submissions** : 22 August 2023

**Judgment** : 14 September 2023

*The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "MV".*

**JUDGMENT**

**[1]** As per the Information filed by the Director of Public Prosecutions (DPP), the accused, Abdul Ashfat Ali, is charged with the following offence:

***Statement of Offence (a)***

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

***Particulars of Offence (b)***

**ABDUL ASHFAT ALI**, on the 11<sup>th</sup> day of August 2018, at Goldfield Road, Tavua, in the Western Division, penetrated the vagina of **MV** with his finger, without her consent.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 3 days. Thereafter, the Learned Counsel for the State and the Defence made their closing submissions.

### **The Burden of Proof and the Standard of Proof**

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) *The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*

(2) *The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

(3) *In this Decree (Act)—*

*"legal burden", in relation to a matter, means the burden of proving the existence of the matter.*

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

### **Legal Provisions and the Elements of the Offences**

- [5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act.

- [6] Section 207(1) of the Crimes Act reads as follows:

*207. — (1) Any person who rapes another person commits an indictable offence.*

- [7] Section 207(2) of the Crimes Act is reproduced below:

*(2) A person rapes another person if —*

*(a) the person has carnal knowledge with or of the other person without the other person's consent; or*

*(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*

*(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

**[8]** Section 207 (2) (b) makes reference to a person penetrating the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent. In the instant case, the accused has been charged for penetrating the vagina of the complainant with his finger.

**[9]** Therefore, in order to prove the count of Rape, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 11 August 2018);
- (iii) At Goldfield Road, Tavua, in the Western Division;
- (iv) Penetrated the vagina of the complainant MV with his finger;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

**[10]** To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

**[11]** The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

**[12]** The fourth element involves the penetration of the complainant's vagina, with the accused's finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his finger to any extent.

**[13]** The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his finger, without her consent.

**[14]** It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

**[15]** Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his finger, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or that he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

**[16]** A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 16 years of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.

[17] It must also be noted that in terms of Section 129 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act), it is stated that no corroboration of the complainant's evidence is necessary to prove an offence of a sexual nature. Rape is obviously considered as an offence of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

### **The Admitted Facts**

[18] Section 135 of the Criminal Procedure Act deals with "Admission of facts". The Section is reproduced below:

*135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.*

*(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—*

*(a) by the prosecutor; and*

*(b) by the judge or magistrate.*

*(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.*

[19] Accordingly, the prosecution and the defence have consented to treat the following facts as "Admitted Facts":

1. ABDUL ASHFAT ALI is the accused in this case.
2. The accused was 23 years old at time of the alleged incident.
3. The accused was working as a Hairdresser at Alliyaz Hair Salon Shop at Tavua Town.
4. The accused was residing at Kavuli, Tavua.
5. MV is the complainant in this case.
6. The accused was Caution Interviewed on 2 October 2018 at Tavua Police Station.
7. The accused was released from Tavua Police Station to go back home after his Caution Interview on the 2 October 2018.

[20] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

### **Case for the Prosecution**

[21] The prosecution, in support of their case, called the complainant, MV, and Dr. Akesa Koto Veiqaravi Funaki. The Medical Examination Report of the complainant was tendered to Court as Prosecution Exhibit PE1.

### **[22] Evidence of the complainant MV**

- (i) *The complainant’s evidence was recorded over a period of 3 days. Her evidence was recorded in a ‘closed court’.*
- (ii) *The complainant testified that she is currently residing at Yalalevu, Ba, with her grandmother (maternal grandmother). She has been residing there for the past 8 years. She said her mother had remarried and was also staying in Ba. However, they were not staying together. Her father had left her mother when she was small.*
- (iii) *She is now 21 years of age. Her date of birth is 14 May 2002. She has one sibling, a sister who is 10 years old. Her sibling is staying with her mother. The complainant is currently a student at Fiji National University (FNU).*
- (iv) *The witness testified that in the year 2018, she was 16 years old. She was attending A. D. Patel College in Ba and was in Form 5 (Year 11).*
- (v) *The witness testified to the events which took place on 11 August 2018. She said on that day she was staying in Tavua, at Salote’s place. She usually goes to Salote’s place every weekend, because they were schooling together. She had come into contact with Salote in 2015, since they were in the same church. Her family and Salote’s family know each other. So they are family friends.*
- (vi) *The complainant testified that in year 2018 she spent most of the time at Salote’s place. Salote stays in Tavua town close to the Fire Station.*
- (vii) *The witness said that in the morning of 11 August 2018, she had been at Salote’s place. Salote went to Alliyaz Shop where Billy was cutting hair. Salote had gone to get her phone repaired. The witness had remained at home.*
- (viii) *When Salote returned home, she had informed the witness that she wanted to sell her phone to Billy for \$100.00, but Billy had told her to give it to him for \$80.00.*
- (ix) *Around 1.30 p.m. Salote had asked the witness to take the phone to Billy and that Billy will pay her the money for the phone. So the complainant had taken the phone to Alliyaz Shop. Upon reaching the shop, she had spoken to*

*Billy. He was attending to one customer. He had told her to wait outside and after attending to the customer that he will come and see her.*

- (x) The complainant said that she knows Billy through Salote's family. He is a friendly guy and she considered him as a brother. As at 2018 she had known Billy for about 6 months. Sometimes when she goes to town, she would see Billy standing outside the shop. Her relationship with Billy was just like a friend.*
- (xi) The witness said that Billy was a Hairdresser by occupation and was working at Alliyaz shop. This shop was located opposite the Tavua Court, besides the Legal Aid Office. She said this shop was located very close or near to Salote's house.*
- (xii) When asked to describe Billy's physique, the complainant said that he is short and tiny. She only knew him as Billy. She didn't know his real name. The complainant testifies that Billy was in Court. She identified the accused in the dock as Billy.*
- (xiii) The complainant testified that in the year 2018, she was 16 years old, and was tiny and short.*
- (xiv) The witness then went on to describe what took place that day. As requested by the accused, the complainant was waiting outside for him for about 10 minutes. Then the accused had come outside and asked for the phone from her. She had given the accused the phone-it was an LG phone. Since there was no charger on the phone, the accused had asked her to sell it to him for \$80.00. The complainant had agreed.*
- (xv) Then the accused had asked the witness to go with him to the New World Supermarket. The complainant said that she had gone with him thinking that he was going to withdraw the money from New World (EFTPOS).*
- (xvi) Then the accused had told her that he is going to buy 4 cans of Joskey. He bought the 4 cans of Joskey from New World Supermarket to drink with her. She had agreed to drink with him. Then she had proceeded with the accused to drink the Joskey.*
- (xvii) They had gone near the Gold Field Road (which leads to the Vatukoula Gold Mines) and the accused and the complainant had started drinking. The witness said that the distance from the New World Supermarket to the place they were drinking was like between the witness box and R. B. Patel Supermarket.*
- (xviii) It was an area surrounded by bush. There were big trees surrounding that place. From there she could see the sugarcane farm and the cassava plantation. They had been sitting on the grass (and drinking). Apart from her and the accused, there was no one else there.*
- (xix) Later the witness stated that the place they were drinking was at a slope. From the Gold Field Road there was a slope which led to the place they were sitting and drinking (so the Gold Field Road was on top and the slope below).*

*From the slope to the drinking spot was about 5 metres. From the place she was sitting she could see vehicles passing on the road above.*

- (xx) *The complainant said that she and the accused were sitting on the grass, facing each other, about 1 metre apart. The accused had finished drinking 1 can of Joskey and took another can and started drinking. The complainant said she had finished drinking about half a can of her Joskey.*
- (xxi) *The witness testified that the accused had then started staring at her in a sexual way. This was about 5 minutes after they had started drinking. When asked to explain, she said, the way the accused had stared at her, she didn't like it. She had got frightened. At the time they were talking about the carnival that was going on in Suva. She had told the accused that the reason why Salote was selling the phone to him was to get money to spend at the carnival. The accused was telling her that he was going to withdraw the money and give it to her. During this whole period of time, the phone was with the accused.*
- (xxii) *The following questions were then asked from the witness and she answered as follows:*

*Q. So then what happened?*

*A. I got frightened. Then I moved away. Then he dragged me. He pushed me down. He tied my hands with some root string there on the ground (vines). He locked both my legs. He pulled my shorts and my underwear down. Then he used his finger (of his right hand) and insert into my vagina.*

*Q. How do you know that it was his finger?*

*A. I can clearly see him do this.*

*Q. How do you know that his finger had been inserted into your vagina?*

*A. I saw him insert his finger into my vagina.*

*Q. How did you feel at this time?*

*A. It was paining in my vagina.*

*Q. What did you do when he was doing this to you?*

*A. I told him to stop. Then he slapped my right cheek with his hand. He then closed my mouth and he said, if I shout he will rape me. Then he stood up and started to masturbate himself in front of me. That is the time when I pushed him. Then I wear my shorts and ran towards the hospital compound.*

- (xxiii) *The complainant explained that the accused had dragged her with his hands. He had tied her hands with the vines and then pushed her down. She*



*had been facing upwards. The witness said: "I got so shocked. I didn't expect him doing that to me".*

- (xxiv) When asked to explain what the accused used to lock both her legs, the witness said, that he locked both her legs by sitting on her legs. This was after he had pulled her shorts and underwear (panty) down. He had used his hand to pull down her shorts and panty. The witness continued: "I just shouted and then he slapped me. He closed my mouth with his hand and he told me don't shout or I will rape you". This was while the accused was inserting his finger into her vagina.*
- (xxv) The complainant said that at the time, in addition to her shorts and her underwear, she had been wearing a t-shirt and a bra on top. The accused had pulled her shorts and underwear down below her knee.*
- (xxvi) At the time the accused was inserting his finger into her vagina, he had been lying on top of her. At that moment, his jeans had been pulled down up to the middle of his thigh. While inserting his finger, the accused was also removing his jeans (with belt) with his other hand. He had closed her mouth and kept putting his finger into her vagina, while the complainant told him to stop. The accused had then stood up and started masturbating. The witness explained that the accused was touching his private part and rubbing it with his hand.*
- (xxvii) The complainant further testified as follows: "That's the time I kicked him with my legs. That's the time I stood up and ran from there. I stood up and bite the vines with my teeth. Then I wore my shorts and ran towards the road where the hospital compound is. When I kicked him, Billy fell down facing upwards".*
- (xxviii) The witness said that while she was running away, the accused was trying to pull up his jeans and wear his belt and may be come after her.*
- (xxix) She had followed the steps and reached the hospital compound. Opposite the Gold Field Road, there are steps leading towards the hospital compound.*
- (xxx) The complainant further testified as follows: "I was crying while running. Then I stopped. Then I saw one (male) Security Guard. He asked me, what's wrong. Then I told him there was a guy who wanted to do something to me. Then he asked me, do you know his name. Then I told him that his name is Billy. Then he told me to go direct to the Police Station and report him".*
- (xxxi) The complainant continued: "While I was walking, I saw Billy at the back of me coming. Then he passed me and then he went straight to Salote's place. Then I sat down near the footpath, near Salote's place and I was crying. Then I saw Billy and Salote were talking. Then they both came to me. Then I told Salote that I don't want to see this man's face again."*
- (xxxii) When asked whether she had told Salote of what the accused had done to her, the witness said no. She said she was shy because it was the first time. When asked again as to why she couldn't tell Salote at that time, the witness*

said: "Because I felt awkward. Because I did not expect Billy to do this to me".

- (xxxiii) Salote had asked the accused about the phone. The accused had told them to take a short cut to get to the BSP Bank. The accused had taken the long way towards the main road, while the complainant and Salote had taken the short cut near the Fire Station. The accused had told them to meet him at the BSP Bank. When they had reached there, they couldn't see or locate the accused.
- (xxxiv) When they couldn't find the accused at that place (BSP Bank), they had gone to the accused's work place (Alliyaz Hair Salon) and met his boss outside the shop. They had asked him as to the whereabouts of the accused. The boss had told them that the accused had left at 6.15 p.m. When he had asked as to what had happened, Salote had told him that he had taken the phone without paying for it. He had told them to go and report the matter to the Police.
- (xxxv) The complainant testified that she had gone with Salote to the Tavua Police Station. She stated that they had gone to report about the phone and also about what had happened to her. The Police had asked her all the details and how it happened. She had told the Police everything.
- (xxxvi) The Police had then taken her to the Tavua Hospital for medical examination. This was on the same day (same evening).
- (xxxvii) The complainant was asked as to when she had told Salote as to what the accused had done to her. She said, the only time she had told Salote about that was at the Police Station. Later the complainant said that Salote came to know about what happened to her only when she was taken for the medical examination by the Police.
- (xxxviii) The witness was asked as to why she did not go direct to the Police Station upon meeting the Security Guard, who had advised her to report the matter to the Police at that time. She explained: "I was still in a shock state. I didn't know what to do".
- (xxxix) The complainant said that she did not agree or consent for the accused to insert his finger into her vagina.
- (xl) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant in line with the defence case theory. The accused completely denies the allegation of Rape made against him by the complainant.
- (xli) It was suggested to the witness that she and the accused were in a relationship at the time of this incident. The witness denied this suggestion and said that she was only 16 years old at the time.
- (xlii) The witness was questioned about the statement made by her to the Tavua Police on 11 August 2018.

- (xliii) *The complainant agreed that the accused had taken the phone and the charger from her and then wanted to charge the phone. She said she had been waiting for the accused, outside his shop, until he came at 3.00 p.m.*
- (xliv) *The witness agreed that she and the accused were having a conversation while drinking Joskey at the spot they were seated in. She agreed that the conversation was about the Hibiscus Carnival being held in Suva and that she was planning to go to the carnival with Salote.*
- (xlv) *It was suggested to the complainant that she had asked the accused for \$200.00 from him to go for the carnival. It was also suggested that the accused had asked her how she will repay the \$200.00 to him and that she had stated that she will pay him back in installments. It was also suggested that the accused had told her that she is not working so how will she pay back the money to him? The witness said she cannot remember any such conversation taking place.*
- (xlvi) *It was suggested to the witness that she had then (at that stage) leaned forward and kissed the accused on his lips. The witness categorically denied this suggestion. It was further suggested that after kissing the accused she had got emotional and that she had started telling him about the physical abuse from her partner Salote. The witness denied these suggestions.*
- (xlvii) *It was further suggested to the complainant that at this point she had gone to relieve herself in the bush. It was further suggested that she had then heard the accused speaking to his wife on the phone and on hearing the accused speaking to his wife on the phone, she had run away from there. The witness denied these suggestions.*
- (xlviii) *It was also suggested to the complainant that she had run away from that place because Salote will find out that she had been drinking with the accused and also because it was getting late. The witness denied these suggestions.*
- (xlix) *The following questions were then asked from the witness in cross-examination and she answered as follows:*

Q. *Do you agree that it is impossible for someone to pull down your shorts and panty at the same time while sitting on your thighs?*

A. *He sat on my thighs and then he locked my right leg, then he pulled my shorts together with my undergarments. Then he inserted his fingers into my vagina.*

Q. *Is it correct that in evidence in chief you said he locked both your legs (not locked your right leg only)?*

A. *I don't know how to explain but I know what happened that day.*

Q. *I put it to you that it is impossible to insert finger into your vagina while both legs are locked?*

- A. *Like I said, he pulled down my shorts together with my panty, locked my right leg and then lift my left leg and then inserted his fingers into my vagina.*
- Q. *I suggest to you that in evidence in chief you did not state that the accused locked your right leg and then inserted the finger into the vagina (you said he locked both your legs)?*
- A. *Like I said he locked both my legs then removed my shorts and panty, locked my right leg and then lift my left leg up and inserted his finger into my vagina.*
- Q. *I suggest to you that in evidence in chief you did not say that the accused lifted your left leg up but you are saying it only now?*
- A. *I do not have any explanation. But I know what happened to me that day because I was there.*
- (I) *It was suggested to the complainant that the accused did not commit the alleged offence on her since it was near the Police Station and it was broad daylight. It was further suggested to the complainant that the accused did not commit the alleged offence knowing that he can see vehicles passing by on the Gold Field Road. The witness denied these suggestions.*
- (II) *It was put to the witness that if the alleged incident had happened, running to the Police Station would have been a wiser choice rather than running to the hospital compound. The witness said that the nearest compound she saw was the hospital compound.*
- (III) *It was put to the complainant that she only reported the matter to the Police because the accused did not pay the \$80.00 for the LG phone and a further \$200.00 that she had asked him to spend at the carnival. The witness denied this suggestion.*
- (IV) *It was further suggested to the complainant that she made this false allegation of rape against the accused when she went to complain about the phone. The witness denied this suggestion.*

**[23] Evidence of Dr. Akesa Koto Veiqaravi Funaki**

- (i) *The Doctor testified that she is currently unemployed and residing in Lautoka. She is 32 years of age.*
- (ii) *She had graduated with an MBBS Degree from the Fiji School of Medicine in 2015. In 2016, she was a Medical Intern at Lautoka Hospital. In 2017, she was working at the Ra Sub-Division Hospital. She has been based at the Tavua Hospital during the period 2018 to April 2019 and from May 2019 to October 2022 she was attached to the Paediatrics Department at Lautoka Hospital.*

- (iii) *Thus she has been practicing as a Medical Officer for over 7 years. She has specialized in general paediatrics. She is currently taking a break from her medical practice.*
- (iv) *The witness confirmed that in 2018 she was based at the Tavua Hospital.*
- (v) *The witness testified that she had conducted the medical examination on the complainant, MV, at the Tavua Hospital, on 11 August 2018 commencing at 8.20 p.m. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE1.*
- (vi) *The witness confirmed that the date of birth of the complainant (as recorded in PE1) was 14 May 2002, and that she was a Year 11 student.*
- (vii) *As to the initial impression of the person to be examined, the Doctor testified that the complainant was a young iTaukei female, nil distress, orientated to place person and time. Appearance unkempt (hair not combed, clothes not ironed), t-shirt dirty and brown. Otherwise converses well.*
- (viii) *The Doctor testified as to the specific medical findings as found in column D12 of the Medical Examination Report. There were haematoma on anterior aspect of the neck (3 in total). A haematoma is a large collection of blood below the skin or a large bruise. Anterior means anything forward (as against posterior). The doctor stated that the haematomas could have been caused by any blunt trauma. Examples of this could be if a person hits an object or non-traumatic haematomas can be caused due to love bites (suckling or biting of the skin).*
- (ix) *There was an area of erythema and swelling on the left cheek bone. Erythema appears in the skin as redness. Usually pink or red depending on the pigmentation of the skin. Swelling means that the skin was raised and that area of the skin was pink. The witness testified that this sort of injury could be caused by slapping the cheek with the hand with large force.*
- (x) *Upon vaginal examination it showed minute (tiny) superficial abrasion. The doctor explained that a superficial abrasion is a wound in which the surface of the skin (top layer of the skin) is rubbed away by blunt trauma. Blunt force meant anything that was not sharp and that causes the superficial layer of the skin to rub away. It could even be caused by a person who scratches that area. The doctor said that this sort of injury could be caused by a finger penetrating the vaginal area.*
- (xi) *Some fine sand had been removed from the vaginal area. It was tender to touch. No active bleeding.*
- (xii) *The hymen was not appreciated when probed with finger (the hymen could not be visualized). A swab was taken. When asked if the hymen could have been penetrated by a finger, the doctor said it was possible.*
- (xiii) *Some scratch marks (superficial abrasions) were found on the anterior aspect of the thigh (inner part of the thigh). This could have been caused by someone struggling with another person.*

- (xiv) *The doctor testified that these injuries could have been caused within a few minutes/hours or few days prior to examination.*
- (xv) *As to her professional opinion as found in column D14, the doctor said that there was no active bleeding or discharge noted vaginally. Examination cannot fully confirm if hymen is intact or otherwise. Sands on vagina suggest an acute fondling of the vaginal area. When asked to explain, the doctor said, acute fondling means a lot of fondling. In a non-traumatic way it would be caressing and in a traumatic way it would be groping.*
- (xvi) *The doctor testified as to the clinical management of the patient as depicted in column D15.*
- (xvii) *As to the summary and conclusions as found in column D16 the doctor's conclusion was that there may or may not be sexual penetration.*

**[24]** At the end of the prosecution case Court decided to call for the defence. The accused was then explained his legal rights. I explained to the accused that he could still remain silent. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. However, if he so desires, I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He was given these options as those were his legal rights.

**[25]** The accused exercised his right to remain silent.

### **Analysis**

**[26]** The prosecution in support of their case, called the complainant, MV, and Dr. Akesa Koto Veiqaravi Funaki. The accused exercised his right to remain silent.

**[27]** The burden of proving each ingredient of the charge of Rape rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove the elements of the charge beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove in this case at paragraph 9 of this judgment.

**[28]** As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as admitted facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.

[29] I have summarized the evidence of the complainant and the medical officer led during the trial. The complainant testified that the accused had inserted his finger into her vagina without her consent.

[30] The defence version is one of total denial.

[31] During evidence in chief, the complainant stated that the accused had dragged her. Pushed her down. Tied her hands with some root string there on the ground (vines). He had locked both her legs, pulled her shorts and panty down. Then he used his finger and inserted into her vagina. When asked how the accused had locked both her legs, the complainant stated that he had sat on her legs/thighs. Later she testified that the accused had sat on her legs/thighs after he had pulled her shorts and panty down with his hands.

[32] When she had told the accused to stop then he had slapped her right cheek with his hand. He had then closed her mouth and had said, *"If you shout I will rape you"*. Then he stood up and started to masturbate himself in front of her. That is the time when she had pushed him, worn her clothes and ran towards the hospital compound.

[33] However, in cross-examination, she gave a different version of the manner in which the incident took place. When it was put to her that it is impossible for someone to pull down her shorts and panty at the same time while sitting on her thighs, the witness said: *"He sat on my thighs and then he locked my right leg, then he pulled my shorts together with my undergarments. Then he inserted his fingers into my vagina"*.

[34] Thus the following questions were then asked from the complainant in cross-examination and she answered as follows:

Q. *Is it correct that in evidence in chief you said he locked both your legs (not locked your right leg only)?*

A. *I don't know how to explain but I know what happened that day.*

Q. *I put it to you that it is impossible to insert a finger into your vagina while both legs are locked?*

A. *Like I said, he pulled down my shorts together with my panty, locked my right leg and then lift my left leg and then inserted his fingers into my vagina.*

Q. *I suggest to you that in evidence in chief you did not state that the accused locked your right leg and then inserted the finger into the vagina (you said he locked both your legs)?*

A. *Like I said he locked both my legs then removed my shorts and panty, locked my right leg and then lift my left leg up and inserted his finger into my vagina.*

Q. *I suggest to you that in evidence in chief you did not say that the accused lifted your left leg up but you are saying it only now?*

A. *I do not have any explanation. But I know what happened to me that day because I was there.*

**[35]** I find that the complainant has contradicted herself on material particulars on this crucial and important point of the manner in which the accused had penetrated her vagina with his finger.

**[36]** Furthermore, the conduct of the complainant soon after the alleged incident casts further doubt on her version of events. Soon after the alleged incident, she says she had gone towards the hospital compound. There she had met a male Security Guard, who had asked her what had happened. She had told him that there was a guy who wanted to do something to her and told the accused's name to him. Then the said Security Guard had told her to go direct to the Police Station and report the accused. However, the complainant had not done so at the time.

**[37]** Instead she had proceeded to her friend Salote's house. However, she had not informed Salote as to what the accused had done to her at that time. She had merely informed her that she does not want to see the accused's face again.

**[38]** However, soon after she had gone together with Salote to meet the accused and collect the money (\$80.00) for the phone. Even during this time she had not informed Salote about anything that the accused had done to her.

**[39]** According to the complainant the first time she had told Salote about the incident was at the Tavua Police Station, when both she and Salote had gone to the Police to report that the accused had taken Salote's phone and had not paid the agreed sum of money.



- [40] This Court is conscious of the fact that children do not always react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned.
- [41] However, considering the totality of the complainant's testimony I find that her evidence is not entirely convincing and cannot be accepted as truthful, credible and reliable.
- [42] The medical evidence too is not conclusive and does not support the prosecution version in its entirety.
- [43] In my opinion, this is a classic case, where both the prosecution version and defence version of the events (which is a total denial) cannot be entirely believed. It seems that the real truth of what had transpired on the 11 August 2018, at Gold Field Road, Tavua, has not been revealed in Court. However, it is the duty of the prosecution to prove the charge against the accused beyond reasonable doubt.
- [44] For the aforesaid reasons, it is my opinion that the prosecution has failed to prove the charge of Rape against the accused beyond reasonable doubt.
- [45] In the circumstances, I find the accused not guilty of the charge of Rape with which he is charged.
- [46] Accordingly, I acquit the accused of the charge of Rape.



  
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 14<sup>th</sup> Day of September 2023

**Solicitors for the State:**

**Office of the Director of Public Prosecutions, Lautoka.**

**Solicitors for the Accused:**

**Office of the Legal Aid Commission, Lautoka.**