

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

**Criminal Case No.: HAC 138 of 2020**

**STATE**

**V**

**APIMELEKI NAVATOGA**

**Counsel** : Ms. S. Swastika for the State.  
: Mr. S. Heritage for the Accused.

**Dates of Hearing** : 03, 04, 05 and 06 October, 2023  
**Closing Speeches** : 11 October, 2023  
**Date of Judgment** : 11 October, 2023

---

**JUDGMENT**

---

*(The name of the complainant is suppressed he will be referred to as "M.N")*

1. The Director of Public Prosecutions charged the accused by filing the following information:

***Statement of Offence***

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

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

APIMELEKI NAVATOGA, on the 21<sup>st</sup> of March, 2019 at Narata village, Sigatoka in the Western Division, had carnal knowledge of "M.N", without his consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer as charged.

### **BURDEN OF PROOF AND STANDARD OF PROOF**

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

### **ELEMENTS OF THE OFFENCE**

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

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

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

#### **ADMITTED FACTS**

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

#### **PROSECUTION CASE**

17. The complainant informed the court that he was born on 12<sup>th</sup> March, 2005 and in the year 2019 he was 14 years of age. He was attending Special School and was living with his parents and siblings at Narata village.

18. On 21<sup>st</sup> March, 2019 at about 10am the complainant after dropping his mother at the village bus stop was going home past the house of the accused his cousin brother who called him inside his house.
19. The complainant went and sat on the settee, the accused was alone in his house. The accused went and closed the back and the front doors came to the complainant and blocked the complainant's mouth from behind and then pushed the complainant on the floor. The complainant lay facing the floor he was scared, the accused started removing the complainant's pants. The complainant was struggling because he did not want the accused to remove his pants. When questioned how he was struggling the complainant said *"I was twisting and turning"*.
20. The accused was able to pull down the complainant's pants and was able to insert his penis into the anus of the complainant by moving his penis in and out repeatedly for a few minutes. The complainant told the accused that it was painful but the accused did not stop he told the complainant not to do anything otherwise he will punch the complainant. When the complainant told the accused it was painful the accused got angry.
21. The complainant also stated that while he was on the floor struggling the accused had his hand on the complainant's mouth blocking it and with the other hand the accused was pulling down his pants whilst kneeling over the complainant.
22. The complainant further said that he did not want the accused to do what he was doing so that is why he was twisting and turning. After the accused had finished he told the complainant to stand up wear his pants and go outside. While outside the accused told the complainant not to tell his

grandmother about what he had done. At this time the accused threw an empty can at the complainant.

23. The complainant went to the bus stop thinking about what the accused had done to him and then he went home. The complainant did not tell anyone at home about what the accused had done to him due to the threat of the accused that he will punch the complainant if he told anyone.
24. After a week the complainant started having back pain and had difficulty in passing his stool since his anus was very painful as a result he started missing school. He also started getting sick and was feeling weak.
25. One evening his parents noticed his condition his father brought a torch and told him to remove his pants and bend over. The complainant told his parents everything the accused had done to him at this time all were crying. After the incident the accused came to the complainant, his parents and grandparents and asked for forgiveness. The accused also said for the complainant not to come to court. The complainant did not forgive the accused for what he had done. The complainant recognized the accused in court.
26. In cross examination, the complainant agreed that on 21<sup>st</sup> March, 2019, he did not go to school because he was sick and weak. The complainant also agreed that in his evidence he had told the court that he was going home when the accused called him inside his house.
27. The complainant was referred to his police statement dated 4<sup>th</sup> April, 2019 to line 3 which was read as follows:

*"I could recall that on 21<sup>st</sup> March, 2019 at about 10am after I had drop my parents at the bus stop in the village. On my way back to my grandmother's place, one Apimeleki Navatoga of the same village called me inside his house."*

28. The complainant agreed he had told the police he was on his way to his grandmother's place. When questioned that after 3 years he was telling the court that he was on his way home the complainant explained that in the village they all lived in the same house.

29. Upon further questioning the complainant agreed that he told the court the accused had blocked his mouth from behind and pushed him to the floor. The complainant was referred to line 5 of his police statement which was read as:

*"As I entered inside the house, he was alone and he started to close all doors and windows of the house and he came to me and grabbed my head and close my mouth and he pushed me to the floor."*

30. The complainant agreed that he did not state in his police statement that the accused came behind him but he had mentioned the accused had grabbed his head. The complainant also agreed that in his evidence he had told the court the accused came from behind grabbed his mouth and pushed him on the floor was totally different from what he had stated in his police statement.

31. The complainant further stated that when he was on the floor the accused was holding him but this was not written in his police statement. The complainant agreed that in his evidence he did not say that the accused was holding him whilst he was on the floor. The complainant further stated that although he had not seen the penis of the accused in his anus he felt

it and that is how he knew it was the accused penis and not something else and at that time the accused was kneeling over him.

32. The complainant agreed that in his evidence he said he was threatened twice by the accused not to do anything otherwise the accused will punch him but in his police statement he had stated he was threatened once only. The complainant agreed there were two different versions before the court. Furthermore, the complainant stated that it was after one week of the alleged incident that he started having back pain and had difficulty in passing stool.
33. The complainant agreed that it was his parents and families who were trying to resolve the issue with the accused but denied that it was his parents and relatives who had approached the accused. The complainant was referred to line 21 of his police statement as follows:  
  
*"My parents have assisted me a lot with other family members in such a way to solve this matter and today we came to police for assistance."*
34. The complainant agreed that he did not tell the police in his police statement that the accused had approached him seeking forgiveness. When it was put to the complainant the accused had never approached him the complainant maintained he was approached by the accused.
35. The complainant agreed that he had not only told the name of the accused to his father but also the name of one Baba. The complainant had also raised an allegation against this Baba for an incident that Baba had raped him. The complainant denied that he was fabricating the allegations against the accused he said both Baba and the accused had penetrated his anus. The complainant denied raising the same allegation against one Tevita Natoba and Poate Vibose from the same village.



36. The complainant agreed that he was taken to the hospital for medical examination on 2<sup>nd</sup> April, 2019 and the night before his father had seen redness around his anal area. When it was put to the complainant that there were no injuries on his anus the complainant stated "*my father saw that I was injured*", however upon further questioning the complainant agreed that he suffered no injuries around his anus. When it was suggested that since he did not receive any injuries around his anus the accused never raped him the complainant said "*he did it to me.*"
37. The complainant maintained that on 21<sup>st</sup> March, 2019 the accused was alone at his house at about 10am and he had gone into the house of the accused after he was called by the accused.
38. The final witness Jeremaia Koroimata the father of the complainant informed the court that the complainant was his eldest son. On 1<sup>st</sup> April, 2019 he noticed that the complainant had a back pain and was holding his back. The witness and his wife asked the complainant for them to have a look.
39. The complainant lay down and he slowly asked what happened. The complainant said after dropping his mother at the bus stop when he was returning he was called by the accused. When he was inside the house the accused closed the doors pushed the complainant on the floor pulled down the complainant's pants and inserted his penis into the complainants anus. The witness could not believe what he heard because the accused is closely related to his wife. The matter was reported to the police. According to the witness the complainant looked sad when he was saying this.

40. In cross examination, the witness agreed that in the weeks before 1<sup>st</sup> April, 2019 the complainant was going to school but was looking weak and on 1<sup>st</sup> April was touching his back. The witness stated that the complainant had told him the incident had happened on 21<sup>st</sup> March, 2019 the witness was referred to his police statement dated 4<sup>th</sup> April, 2019.
41. After perusing his police statement the witness stated that it was not stated in his police statement that the complainant had told him that the date of the incident was 21<sup>st</sup> March, 2019. The witness stated the complainant had not told the witness the date of the incident.
42. The witness denied that the complainant had told him the date of the incident before coming to court, he agreed that it was not in his police statement that the complainant had told him that the accused had called the complainant into his house pushed him on the floor, pulled the complainant's pants down and had penetrated the anus of the complainant with his penis.
43. The witness agreed that when he showed the torch light on the complainant's back he saw some redness around the anus but the doctor had told him there were no injuries seen around the complainant's anus. The witness denied that the doctor had told him there was no redness around his son's anus.
44. In re-examination the witness clarified that the complainant had told him everything about what the accused had done but he did not tell this to the police.
45. This was the prosecution case.

## **RECENT COMPLAINT DIRECTION**

46. Complainant's of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
47. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that the complainant told his father that after dropping his mother at the bus stop when he was returning home he was called by the accused. When he was inside the accused house the accused pushed the complainant on the floor pulled down the complainant's pants and inserted his penis into the complainant's anus.
48. This is commonly known as recent complaint evidence. The evidence given by Jeremaia is not evidence of what actually happened between the complainant and the accused since he was not present and he did not see what had happened.
49. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told his father about what the accused had done to him when his back started paining as a result of what the accused had done.

50. The prosecution is also asking this court to consider the observations of the complainant by Jeremaia at the time he was relaying the conduct of the accused on him and the pain of the complainant which made Jeremaia take note of the fact that there was something wrong with the complainant and therefore the complainant is more likely to be truthful.
51. On the other hand, the defence says the complainant had made up a story against the accused, he was not at his house on the date and time as alleged. The story narrated by the complainant lacks credibility he did not tell his father that the accused had done anything to him. This is supported by the fact that no complaint was made by the complainant to his father immediately after but after 12 days. The back pain cannot be from the alleged incident.
52. When Jeremaia had questioned the complainant about the back pain the complainant falsely blamed the accused. Another important issue the defence wishes to raise is that there is a significant inconsistency between what Jeremaia told the police in his police statement when facts were fresh in his mind with his evidence.
53. Jeremaia agreed in cross examination that he did not tell the police that the complainant had told him about the alleged incident yet after four years Jeremaia told the court in detail that the complainant had told him in 2019 that the accused had penetrated his anus is too far-fetched. The complainant was 14 years at the time and the delay of 12 days gave the complainant an opportunity to make up a false story against the accused therefore the complainant should not be believed.
54. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to his credibility and reliability as a

witness. It is for this court to decide whether the complainant is reliable and credible. The real question is whether the complainant was consistent and credible in his conduct and in his explanation of it.

55. This was the prosecution case.

### **DEFENCE CASE**

56. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called two witnesses. This court must also consider their evidence and give such weight as is appropriate.

57. The accused informed the court that on 21<sup>st</sup> March, 2019 after breakfast at 6am he left home for his farm. His farm is located near the complainant's cassava farm. He was in his farm from 6am till lunch hour between 12 to 1pm.

58. When he arrived home his wife was preparing lunch, after lunch the accused again went to his farm. The accused was caution interviewed by the police on 1<sup>st</sup> August, 2019. He told the police that he did not commit the offence against the complainant and at the time of the allegation he was at his farm leaving home at 6am and that his wife and children were at home. The allegation raised against him was false and the complainant was lying.

59. In cross examination the accused agreed that the complainant was his cousin brother and the complainant would come to his house sometimes. The accused knew the complainant was attending special school, being elder than the complainant the accused had a duty of care and

responsibility to protect the complainant. Although it is normal to take breaks while working in the farm he does not come home during those breaks but goes to his farm house.

60. On this day he was ploughing the land with his bullocks. The accused could not tell exactly what time he went to have his lunch at home. He did not continuously work in the farm he had breaks and also ate his food in the farm house.
61. The accused denied the allegation raised against him he maintained that on 21<sup>st</sup> March, 2019 at around 10am he was not at home as alleged. His wife and children were at home and they had not gone to Nakalavo village on this day.
62. The wife of the accused Seruwaia Basiluva informed the court that in 2019 she was residing at Narata village with the accused and their two children. On 21<sup>st</sup> of March, 2019 the witness woke up in the morning at 6am and made breakfast for the accused before he left for the farm. After the accused left she slept again.
63. After the children woke up the witness again made breakfast for the children, thereafter the witness did her house work and after shower at 11:30 am the children again went to sleep. The children were three and two years of age at the time.
64. The accused came home from farm at 4pm and on this day the complainant did not come to her house and she did not meet him.

65. In cross examination the witness agreed that she has a good relationship with the accused and she loves him but she would not say anything to protect the accused.
66. The witness agreed the accused has a cassava farm but he did not have any bullocks. The witness maintained that on 21<sup>st</sup> March, 2019 she was at home when referred to her police statement dated 2<sup>nd</sup> August, 2019 the witness stated that the date she was at home was not in her police statement. When it was put to the witness that the reason why the date 21<sup>st</sup> March, 2019 was not in her police statement was because she did not remember the date the witness said she remembered.
67. When questioned that it was important to tell the police where she was on 21<sup>st</sup> March, 2019 the witness said the police did not ask her. When asked again that it was important to tell the police where she was on 21<sup>st</sup> March, 2019 the witness agreed. The witness denied the suggestion that on 21<sup>st</sup> March, 2019 she was not at home but in Nakalavo village.

#### **PREVIOUS INCONSISTENT STATEMENT**

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

70. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
71. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witnesses. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
72. The final witness Dr. Suliana Makarita Saverio informed the court that she graduated with an MBBS degree in 2013 from the Fiji School of Medicine and this is her 9<sup>th</sup> year as a Medical Officer.
73. On 2<sup>nd</sup> April, 2019 the witness had examined the complainant at the Sigatoka Hospital, the Fiji Police Medical Examination Form of the complainant was marked and tendered as defence exhibit no.1.
74. Since this was a case pertaining to anal penetration the witness had carried out a perineal examination which meant examination of the part the body between the anus and the scrotum. The specific medical findings of the witness were:
- (a) No bleeding;
  - (b) No lacerations/cuts;
  - (c) No abnormalities/ scars were noted.



75. The witness had illustrated her findings at appendix 1, furthermore she explained that laceration means tear to the skin due to blunt force trauma. The witness further stated that for a 14 year old child to be penetrated by an adult there could be lacerations, tears of the skin on the area of penetration and there could be scars seen.
76. According to the witness there could be immediate effect of the injuries depending on the severity of the assault very severe trauma to the anus could also have long term effect such as problems with the anal passage like passing of stool if the penetration was very traumatic.
77. In cross examination the witness agreed that the issue of penetration by blunt force trauma cannot be ruled out entirely and if the alleged penetration of the anus had taken place 13 days before the medical examination there is a possibility that there would not be any laceration and bleeding.

#### **DIRECTION ON EXPERT EVIDENCE**

78. This court has heard the evidence of Dr. Saverio who had been called as an expert on behalf of the defence. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.
79. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the replacement doctor. When

coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.

80. This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.

81. This was the defence case.

#### **ANALYSIS**

82. The prosecution states that the complainant and the accused are cousin brothers and were staying in the same village. In the year 2019 the complainant was 14 years of age and attending Special School.

83. On 21<sup>st</sup> March, 2019 at about 10am the complainant after dropping his mother at the village bus stop was going home when he went past the house of the accused. The complainant was called by the accused to come inside his house.

84. When the complainant went inside the accused closed both the doors went to the complainant blocked his mouth from behind and pushed him on the floor. The complainant was scared he lay facing the floor the accused started removing the complainant's pants. The accused put his hand on the complainant's mouth blocking it and with the other hand the accused was pulling down his pants whilst kneeling over the complainant. The

complainant was struggling by turning and twisting because he did not want the accused to remove his pants.

85. The accused was able to pull down the complainant's pants and was able to insert his penis into the anus of the complainant by moving his penis in and out repeatedly for a few minutes. The complainant told the accused that it was painful but the accused did not stop he told the complainant not to do anything otherwise he will punch the complainant.
86. The complainant did not consent to what the accused had done to him. After a week the complainant started having back pain and had difficulty in passing his stool since his anus was very painful. One evening the complainant's parents noticed his situation his father brought a torch and told him to remove his pants and bend over. The complainant told his parents everything the accused had done to him. The matter was reported to the police.
87. On the other hand, the defence says the allegation is a made up story narrated in court by the complainant. The complainant has a habit of making false complaints against people. He had told the court that he was raped by one Baba as well but he did not lodge any complaints against this Baba. The complainant did not tell anyone about what the accused had done because nothing had happened. It took him 12 days to tell his father about the allegation (which was not volunteered by him) but upon prompting by his father.
88. Jeremaia the father of the complainant cannot be believed because when this witness was cross examined he told the court that at the time he gave his police statement he had not told the police officer writing his police statement about the date of the allegation, and the details of what was

narrated to him by the complainant about the conduct of the accused. Moreover, Jeremaia had agreed that the facts were fresh in his mind at the time yet he did not tell the police anything about the allegation shows there is a very strong inconsistency between the complainant and Jeremaia.

89. Defence submits that the evidence of Jeremaia is suspicious because he was basically narrating everything in line with what the complainant had told the court. This cannot be a coincidence but was to give consistency to the evidence and the conduct of the complainant which in reality was not the case.
90. Moreover the accused has been consistent throughout the investigation when he was caution interviewed by the police he told them what he told the court. From the outset the accused has maintained that on the date and time alleged he was not at home but was in his farm. It was only his wife and children who were at home. He left home at 6am and returned home between 12 pm and 1pm.
91. The wife of the accused also gave evidence that the accused had left the house in the morning and returned in the afternoon and she had not seen or met the complainant on the day in question. The father of the complainant had said that he had seen some redness around the anus of the complainant but when the doctor gave evidence she did not see any injuries or laceration in and around the anus of the complainant.
92. Finally the defence is saying the doctor gave a reliable account of her medical examination of the complainant in particular that there was no sign of any penetration of the complainant's anus. The defence is asking this court not to believe both the prosecution witnesses.
93. This was the defence case.

## **DEFENCE OF ALIBI**

94. It is noted that the accused is relying on the defence of alibi. He took the position that on 21<sup>st</sup> March, 2019 he was not at his house as alleged by the complainant. At around 6am on this day the accused had left his house and gone to his farm. He returned home between 12pm and 1pm.
95. In view of the above defence I have reminded myself of the following:
- a) Firstly, the prosecution has to prove the guilt of the accused so that this court is sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the defence of alibi. Even if this court concludes that the alibi was false, that does not by itself entitle this court to find the accused guilty;
  - b) Secondly, it is borne in mind that an alibi is sometimes invented to bolster a genuine defence;
  - c) Even if this court concludes that the defence put forward by the accused has not been made out that does not of itself entitle this court to find the accused guilty? The prosecution must still satisfy this court beyond reasonable doubt of his guilt.
96. The accused has denied any wrong doing his defence is he did not commit the offence as alleged since he was not at the alleged crime scene but somewhere else.
97. From the above, there are three possibilities that arise which is open for consideration:
- a) If the alibi is accepted then this court is obliged to find the accused not guilty;

- b) If this court rejects the alibi then this court would not necessarily find the accused guilty but must assess the evidence as a whole; and
- c) If this court does not accept the alibi, and also does not reject it in the sense that this court regards it as something which could reasonably be true then in such a case this court must find the accused not guilty.

98. Prematilaka, JA sitting as a single judge in Court of Appeal in *Pauliasi Raisele v State* [2020] FJCA 49; AAU088.2018 (1 May 2020) made a pertinent observation in respect of the above from paragraphs 20 to 28 as follows:

*[20] The learned trial judge had in paragraphs 103 and 125 directed the assessors and himself on the lines suggested in Ram and Mateni. He cannot be faulted in that respect.*

*[21] A slightly different approach, however, had been taken in some other jurisdictions such as Australia, Sri Lanka and New Zealand. Section 150(8) of the Criminal Procedure Act 1986 (NSW) states that*

*“evidence in support of an alibi means evidence tending to show that, by reason of the presence of the accused person at a particular place or in a particular area at a particular time, the accused person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.”*

*[22] In what would be the appropriate direction on alibi in NSW Roden J at 5-6 (Street CJ, Slattery CJ at CL concurring said in R v Amyouni NSWCCA 18/2/88 unrep. BC8802201:*

*"It seems to me that in every case where that situation is met, there are three possibilities, all three of which should be explained to the jury."*

*"One is that they accept the alibi, in which event they would be obliged to acquit. The second is that they reject the alibi, in which case they would not necessarily convict but must assess the evidence as a whole. The third possibility is that although they do not accept the alibi, they also do not reject it in the sense that they regard it as something which could reasonably be true. In that event also, in such a case, they must acquit."*

*[23] Again in R v Kanaan (2005) 157 A Crim R 238; [2005] NSWCCA 385 Hunt AJA (Adams and Latham JJ concurring) said*

*"[134] It was common ground that the Crown had to establish beyond reasonable doubt that the appellant was present at the crime scene. The appellant complains, however, that at no time did the judge ever in terms direct the jury that, in order to convict the appellant, they had to reject the evidence of alibi beyond reasonable doubt."*

*"[135]... An alibi asserts that, at the relevant time, the accused was not at X (the scene of the crime) but at Y (somewhere else, according to the alibi evidence). The issue which it raises is whether there is a reasonable possibility that the accused was at Y, rather than X, at that time. To prove beyond reasonable doubt that the accused was at X, the Crown must remove or eliminate that reasonable possibility: Regina v Youssef (1990) 50 A Crim R 1 at 2-3. An appropriate direction to the jury would be:*

*The Crown must establish beyond reasonable doubt that the accused was at X at the relevant time. The Crown cannot do so if there is any reasonable possibility that he was at Y at that time, as asserted by the alibi evidence. The Crown must therefore remove or eliminate any*

reasonable possibility that the accused was at Y at the relevant time, and also persuade you, on the evidence on which the Crown relies, that beyond reasonable doubt he was at X at that time.”

[24] In Sri Lanka in Yahonis Singho v. The Queen (1964) 67 NLR 8 at 9- T. S. Fernando J. said

*‘If the evidence of an alibi is accepted, such acceptance not only throws doubt on the case for the prosecution but, indeed, it does more, it destroys the prosecution case and establishes its falsity. As the jury convicted the appellant, it must be assumed that they did not accept the evidence of Sirimane. The learned judge directed the jury, if we may say so with respect, correctly as to what course they should follow if they rejected the evidence of Sirimane. He, however, omitted altogether at both stages of his charge referred to above to give them any direction as to what they were to do if they neither accepted Sirimane’s evidence as true nor rejected it as untrue. Jurors may well be in that position in regard to the evidence of any witness. There was in this case no question of a shifting of the burden of proof which throughout lay on the prosecution. If Sirimane’s evidence was neither accepted nor was capable of rejection, the resulting position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction of the jury on a necessary point and thus constituted a misdirection.’*

[25] Yahonis Singho was quoted with approval in Mannar Mannan v Republic (1987) 2 SLR 94 where, however, the proviso under section 334(1) of the Code of Criminal Procedure Act was applied and the conviction was upheld which was affirmed by the Supreme Court in Mannar Mannan v Republic (1990) 1 SLR 280.



[26] Blackstone's Criminal Practice 1993 at page 1773 states

*'Although there is no general rule of law that in every case where alibi is raised the judge must specifically direct the jury that it is for the prosecution to negative the alibi, it is the clear duty of the judge to give such a direction, if there is danger of the jury thinking that an alibi, because it is called a defence, raises some burden on the defense to establish it (Wood (No.2) (1967) 52 Cr App R 74 per Lord Parker CJ). See also Johnson [1961] 1 WLR 1478 and Denney [1963] Crim LR 191.'*

[27] It is well established that it is for the prosecution to negative an alibi as in the case of self-defence or provocation [See Killick v The Queen (1981) 147 CLR565; [1981] HCA 63; 37 ALR 407, R v Johnson (1961) 46 Cr App R 55; 3 ALL ER 969 and R v Taylor [1968] NZLR 981 at 985-6] because by raising an alibi, the accused was not undertaking to prove anything, and that onus remained on the Crown to remove or eliminate any reasonable doubt which may have been created by the alibi claim or any reasonable possibility that the alibi was true [ see R v. Small (1994) 33 NSWLR 575; 72A Crim R 462 (CCA)]. If the alibi evidence is so cogent as to engender in any reasonable mind a doubt of the accused's guilt, the conviction must be quashed and a verdict of an acquittal entered, however cogent the prosecution evidence would otherwise be [see Palmer v R (1998) 193 CLR1; [1998] HCA 2; 151 ALR 16]

[28] I think that it is in the light of these decisions that one should reconsider as to what the appropriate direction particularly on the intermediate position on alibi defence should be in Fiji. However, it is within the domain of the Full Court of the Court of Appeal to make a pronouncement, if considered appropriate, at least for future guidance.

### **DETERMINATION**

99. I would like to once again remind myself that the burden to prove the accused guilty beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
100. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. He gave a reliable account of what the accused had done to him. The complainant was also able to withstand cross examination and was not discredited as to the main version of his allegation.
101. The complainant was resolute and unwavering in what he had encountered on the 21<sup>st</sup> March, 2019. I have no doubt in my mind that the complainant told the truth in court. His demeanour was consistent with his honesty.
102. I accept that it was the accused and no one else, who had penetrated the complainant's anus with his penis without his consent. The accused and the complainant are cousins and they knew each other well.
103. The allegation is about a broad day light happening and the close proximity of the accused and the complainant before, during and after the allegation cannot be ignored. The defence by bringing into limelight an incident that occurred between one Baba and the complainant was in my considered judgment diverting attention away from the main issue involving the accused.

104. I accept that the complainant had not consented to what the accused had done to him. I also observed that the complainant had a strong view against the conduct of the accused and he had expressed himself clearly that he did not consent to what the accused had done.
105. I accept there were some inconsistencies and omissions between what the complainant told the court and his police statement, however, these inconsistencies and omissions were not significant to affect the credibility or the thrust of the complainant's evidence.
106. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.20 (2 October 2015) had made the following pertinent observations about the above at paragraph 16 as follows:

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

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

107. Another pertinent observation was also made by the Court of Appeal in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at

paragraph 107 in the following manner about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made by the Indian Supreme Court in *State of UP v. M K Anthony (1985) 1 SCC 505*:

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

108. It cannot be ignored that at the time of the unexpected happening the complainant was 14 years of age and he was giving evidence after 4 years of the incident hence there are bound to be some inconsistencies or omissions.
109. The defence did not raise any motivation on the part of the complainant to implicate the accused both knew each other and were related. I accept there was a delay of about 12 days by the complainant in reporting the incident to his father and the police. However, the delay was not unreasonable. I accept the accused had threatened the complainant not to tell anyone and as a result the complainant had not told anyone about the incident. When the opportunity came the complainant did not hesitate

to inform his father and then to the police which he did and got medically examined.

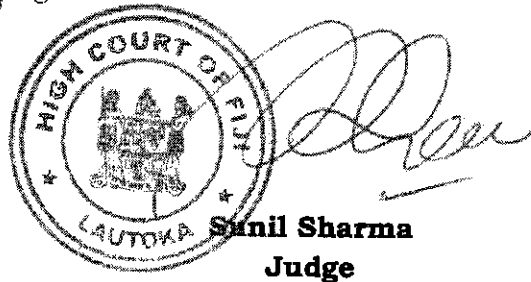
110. I also accept the evidence of the doctor that no injuries seen does not mean that forceful penetration did not take place the possibility is there.
111. Furthermore, the fact that the complainant's police statement was taken on 4<sup>th</sup> April, 2019 does not mean that he had time to fabricate his complaint. In any event the delay in reporting considering the circumstances of the complainant is not unreasonable (see *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4<sup>th</sup> October, 2018)*).
112. I also accept that the complainant had told his father Jeremaia about what the accused had done to him but it was Jeremaia who did not tell the police everything he was told by the complainant. Had the complainant not told Jeremaia the complainant would not have been taken to the police station and then to the hospital by and in the company of Jeremaia.
113. The circumstances of the complainant ought to be considered holistically. It cannot be ignored that the complainant was a child of 14 years at the time who was oblivious to an unexpected conduct by a person known to him and twice his age with a threat not to tell anyone and both were living in the same village.
114. There is no requirement for a complainant of sexual assault to disclose every detail of the accused conduct to the person the information is relayed to. The crucial aspect is the relaying of material and relevant information about the unlawful sexual conduct of the accused to Jeremaia which had resulted in a police complaint.

115. The decisive aspect of recent complaint evidence is to show consistency of the complainant's conduct with his evidence given at trial. I accept the reason given by Jeremaia that it was him who had not told the police officer writing his police statement everything the complainant had told him.
116. On the other hand, the accused did not tell the truth he gave a version of events which is not tenable or plausible on the totality of the evidence. I reject the defence assertion that the accused was not at home and he did not do anything to the complainant as unworthy of belief. He did not tell the truth when he said that on the day in question he left home at 6am and was ploughing his farm with his bullocks only to return between 12pm and 1pm.
117. Seruwaia the wife of the accused also did not tell the truth it was obvious to me that she was parroting what she wanted to tell the court with the view to protecting the accused by saying that he was not at home on 21<sup>st</sup> March, 2019 at around 10am. Even the defence counsel had difficulties in getting clarity in re-examination since this witness was so desperate in repeating her answer to the effect "*nothing happened on that day*".
118. When considering the evidence of the accused and Seruwaia they were at odds with each other in the following manner:
- a) Accused said he left home at 6am whereas Seruwaia said she woke up and started cooking at 6am;
  - b) Accused said he was ploughing his farm with his bullocks whereas Seruwaia said they did not own any bullocks;
  - c) Accused said he returned home from his farm between 12pm and 1pm whereas Seruwaia said the accused returned home at 4pm.

119. I do not give any weight to the evidence of the accused and his wife Seruwaia who were acting in concert to tell the court a version of events which unfortunately did not add up in court. Both were trying to overshadow the real facts to make their version of events look trustworthy and reliable.
120. It was obvious to me that the accused and Seruwaia had concocted a story to make the accused look like a victim of a false complaint. The defence was also diverting attention away from the accused by dragging the name of one Baba and making it look like the complainant was in the habit of blaming people.
121. I do not accept that the allegation was made up by the complainant to falsely implicate the accused. On a review of the entire evidence before this court particularly the defence of alibi raised and the evidence of the accused and his defence witness Seruwaia I rule that the prosecution which has the burden to disprove the defence of alibi raised has been able to rebut the defence of alibi beyond reasonable doubt. I accept the evidence of the doctor that anal penetration cannot be ruled out and that due to the delay of 13 days in coming to the hospital there was a possibility that the injuries on the anus of the complainant had healed.
122. This court is satisfied beyond reasonable doubt that on the 21st March, 2019 the accused was at his house and on this day he had forcefully penetrated the anus of the complainant with his penis without the complainant's consent.
123. The defence has not been able to create a reasonable doubt in the prosecution case in respect of the offence as charged.

## **CONCLUSION**

124. This court is satisfied beyond reasonable doubt that the accused on 21<sup>st</sup> March, 2019 had penetrated the anus of the complainant with his penis without his consent. The accused knew or believed the complainant was not consenting or didn't care if he was not consenting at the time.
125. In view of the above, I find the accused guilty of one count of rape as charged and he is convicted accordingly.
126. This is the judgment of the court.



**Sunil Sharma**  
Judge

**At Lautoka**  
11 October, 2023

### **Solicitors**

**Office of the Director of Public Prosecutions for the State.**  
**Messrs Iqbal Khan & Associates for the Accused.**