

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 62 of 2022

STATE

V

NIKO RADIVA

Counsel : Mr. M.I. Rafiq for the State.
: Ms. S. Singh for the Accused.

Dates of Hearing : 16, 17 November, 2023
Closing Speeches : 20 November, 2023
Date of Judgment : 20 November, 2023

JUDGMENT

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

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

FIRST COUNT

Statement of Offence

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

Particulars of Offence

NIKO RADIVA on the 16th day of April, 2022 at Lautoka in the Western Division, penetrated the vagina of “A.D” with his finger, without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

NIKO RADIVA on 16th day of April, 2022 at Lautoka in the Western Division, unlawfully and indecently assaulted “A.D”, by sucking her breasts.

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 in respect of both the counts 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

RAPE

4. In respect of the first count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:

- (a) The accused;
 - (b) Penetrated the vagina of the complainant with his finger;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
5. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his finger without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
6. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
7. The second element is the act of penetration of the complainant's vagina by the finger.
8. The third element is of consent, consent means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, or by a mistaken belief induced by the accused person that the accused person was the complainant's sexual partner then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
9. If this court is satisfied that the accused had penetrated the vagina of the complainant with his finger and she had not consented, then this court is required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.

10. To answer the above this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
11. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his finger into the complainant's vagina without her consent, then this court must find the accused guilty as charged.
12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused finger is sufficient to satisfy the act of penetration.

SEXUAL ASSAULT

14. To prove count two the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant "A.D" by sucking her breasts.
15. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed this offence.
16. The words "unlawfully" and "indecently" in respect of the second element of the offence of sexual assault means, without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.

17. The final element of assault is the unlawful use of force on the complainant by sucking her breasts.

In this regard this court has to consider:

- (a) whether the force used in sucking the complainant's breasts was sexual in nature; and
- (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.

18. In this trial, the accused has denied committing the offence of sexual assault. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by sucking her breasts.

19. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offence of sexual assault as explained above, then this court must find the accused guilty. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then this court must find the accused not guilty.

20. As a matter of law, I direct myself that offences of sexual nature as in his 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.

21. In this case, the accused is charged with more than one offence, I have borne in mind that the evidence in each count is to be considered separately from the other. It is not to be assumed that because the accused is guilty of one count that he must be guilty of the other as well. This also applies to the outcome of not guilty.

ADMITTED FACTS

22. 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.
23. 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

24. The complainant informed the court that on 16th April, 2022 at around 5 to 6 am the complainant was sleeping with her defacto partner Joseph at her brother's small corrugated iron house which was about 5 meters away from the house of her father at Nanuku Settlement, Natabua.
25. The reason for sleeping in her brother's house that early morning, was because there was a function at her father's house and her relatives were staying at that house which was overcrowded. While the complainant was sleeping with Joseph she felt someone's hand inside her panty and she felt a finger being inserted into her vagina.

26. This person was also sucking her breasts at the same time. The complainant does not know when this person was able to lift her top and bra and was sucking her breasts. The complainant at first thought it was Joseph because Joseph was sleeping next to her.
27. The complainant was dragged and it was only when this person said in Itaukei "*lako mai magaitinamu*" meaning "*come here mother fucker*" that she realized it was not Joseph. The complainant opened her eyes and she looked directly at this person and said "*who are you*". The accused responded in Itaukei by saying "*O iko saraga qo Amy au vaqarai iko tiko mai*" meaning "*so you are Amy, I have been looking for you.*"
28. Upon hearing this, the complainant tried to get away but she could not so what she did was she shouted at her husband and kicked him to wake him. The complainant recognized the accused, by this time he had put his hands under her shoulders and had dragged her about 2 meters away from the mattress she was sleeping on towards the house door.
29. While the complainant was shouting to Joseph the accused did not stop but kept dragging her until Joseph stood up. The complainant knows the accused by his first name and that the accused was the landowner's wife's nephew. The complainant knows the accused since he was in primary school.
30. When the complainant opened her eyes there was nothing between the accused and her because the accused was in front of her face. As a result of this she was able to see the accused face clearly, since it was around 5 to 6 am there was brightness outside and the house had a lot of windows.

31. The complainant stated that she did not want the accused to do what he had done to her. Furthermore, the complainant stated that when she woke up the accused was leaning over and looking at her.
32. When Joseph woke up from sleep he said "*what's going on*" the complainant said someone was touching her. He said "*who*" the complainant pointed outside Joseph went to the window pulled the curtain shades to see who it was and he saw Niko who started to run away. Joseph followed Niko by this time her other family members woke up. The complainant ran after Joseph in the direction the accused had run towards the accused aunt's house and she saw the accused come out of the house. The complainant confronted the accused but he denied the allegation he said "*you must be tripping.*" The matter was reported to the police the same morning. The complainant recognized the accused in court.
33. In cross examination the complainant said that the accused stayed somewhere else but he used to visit his aunt's house for Christmas holidays. The accused was also her brothers friend. There was a function at her father's house the previous night and she had drank grog and it was nearly 4am when she went to sleep.
34. The complainant agreed that at the Nanuku Settlement there were other boys of similar age as the accused. The house of her brother did not have a normal door which could be locked. It had a corrugated iron placed across at the entrance.
35. The complainant said that it was not dark inside the house but bright at the time since the sun was out. The complainant maintained that it was the accused who had done what she had told the court. When it was suggested that her vision was hazed and she could not consciously see

who this person was the complainant said *"from my first glance, yes that's when I asked who are you until I took a second look properly I saw who he was because when he ran he stood to see if my husband woke up when he saw my husband pull the curtain then he ran away."*

36. The complainant maintained that it was the accused she saw the clothes he was wearing and he smelt of alcohol. She was not mistaken the accused was close to her and while dragging her she once again saw him. Finally she had seen him standing outside the house before running away.
37. According to the complainant the accused for the past one year would come to her house and sit under the breadfruit tree and talk. Her family treated him like family, the accused was also friends with her younger siblings as well. The complainant said she knows what the accused looks like, and she can recognize his face and voice.
38. The final witness Joseph Kaveni the partner of the complainant informed the court that on 16th April, 2022 after about 5 am he was sleeping with the complainant at the house of his brother in law when he heard his name being called by the complainant.
39. He saw the accused dragging the complainant towards the door of the house. He woke up and looked outside the window he saw the complainant and the accused outside the house. He saw the complainant was shocked, scared and the accused was harassing the complainant and then the accused ran away. The complainant and the accused were two meters away from the witness. The witness ran towards the complainant and the accused.

40. The witness knows the accused who used to come to Nanuku Settlement at lot. The complainant told the witness the accused was harassing her by sucking her breast and touching her vagina. When the complainant was telling him this she was crying. The matter was reported to the police the same day.
41. In cross examination the witness stated that he was drinking grog at the family function and it was around 3 am he went to sleep. The witness did not personally know the accused and prior to 16th April he had seen the accused when he was going to work.
42. The witness denied the suggestion that it was not the accused but someone else the witness maintained that it was the accused and he had seen the accused through the window. The witness denied that because he had consumed grog / wine the previous night his vision was hazed and his judgment was not sound.
43. Upon further questioning the witness stated that he had seen the accused outside his brother in law's house and then at the house of the accused aunt. The witness agreed that he would have identified the accused even if his wife had not told him that it was the accused because he had seen the accused standing outside the window.

RECENT COMPLAINT DIRECTION

44. 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.

45. 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 Joseph the accused had harassed her by sucking her breast and touching her vagina.
46. This is commonly known as recent complaint evidence. The evidence given by Joseph is not evidence of what actually happened between the complainant and the accused since he did not see what had happened.
47. 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 immediately told Joseph about what the accused had done to her in complete detail as soon as Joseph woke up.
48. The prosecution is also asking this court to consider the observations of the complainant by Joseph that the complainant was shocked, scared and she was crying when relaying her experience to Joseph therefore the complainant is more likely to be truthful.
49. On the other hand, the defence says the complainant made up a story against the accused, he was not at the house where the complainant was sleeping. How could he be there when he had no clue that the complainant was sleeping in that house. He did not do anything to the complainant as alleged. He was drinking with a group of boys from 8 pm on the 15th till 2

am the next day. He was drunk that he went home and slept. He even could not wake up when his aunt was waking him in the morning.

50. The story narrated by the complainant lacks reliability and is baseless because that someone was not the accused. The complainant has made a gross mistake in pointing a finger at the accused when the real culprit is still out there. The complainant has wrongly blamed the accused because he was friends with her brothers and therefore the complainant should not be believed.
51. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is for this court to decide whether the complainant is reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
52. This was the prosecution case.

DEFENCE CASE

53. 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 one witness. This court must also consider this evidence and give such weight as is appropriate.
54. The accused informed the court that on 16th April, 2022 from the morning he was sleeping at his aunt's house at Nanuku Settlement. From the previous night he had been drinking beer with his cousin Ilimotana, Bosco and Kameli. The accused had left his house at about 8 pm to go and drink

at Natabua Stage 2. When he left home his aunt Anaseini Tinai, cousin Apenisa and Apenisa's ex-girlfriend were at home.

55. As the drinking continued the accused went home and then went back to continue drinking. It was at 2 am he came home since he was hungry. The accused said he did not know the complainant and her husband Joseph Kaveni but he knew their names. He is friends with the complainant's brothers Sani and Tikiko.
56. Before reaching home at 2 am the accused bought a cigarette about 2 houses away from his home thereafter he told the other boys that he was going to sleep. When questioned what did he do at home at 2 am the accused said *I came home I was starving I don't know who was at home but when I came home I went to sleep. Even though I was starving I can't remember did I eat anything? But I went to sleep.*
57. In the morning after 6 am Joseph Kaveni came looking for the accused, *Kaveni called out but I was sleeping and all of a sudden my aunt came to me and tried to wake me up.*
58. According to the accused his aunt tried to wake him but he did not wake up. Shortly after the complainant's elder brother Sunia came and assaulted the accused, dragged him out of the house and brought him to where the incident had happened. From here he was arrested by a police officer and taken to the Natabua Police Post.
59. The accused denied all the allegations raised against him by the complainant. He stated that he did not go to the complainant's brother's house that morning and he would not do any such thing to the complainant. He denied swearing at the complainant as well.

60. The accused maintained that it was not him and that the complainant was mistaken. On 16th April, 2022 the accused was wearing a grey shorts and a black basketball vest and a brown leather jacket.
61. In cross examination the accused said he had removed his brown leather jacket before sleeping. Upon further questioning the accused said at first the complainant and her husband came looking for him and after they left the elder brother of the complainant Sunia came.
62. The accused did not bother to check why they were looking for him because he was drunk and he wanted to sleep comfortably. The accused stated that he never did such a thing to the complainant as mentioned by her.
63. The accused denied that he had any lustful thoughts about the complainant he said he has never spoken to the complainant in his life. The accused denied all the allegations raised against him by the complainant. He did not go to the complainant's house that early morning.
64. The final defence witness Apenisa Ralovo informed the court that the accused is his first cousin. In the night of 15th April, 2022 he was drinking at his house at Nanuku settlement with his former girlfriend.
65. They were drinking till the morning of the 16th. The accused came home at around midnight. The witness did not see the accused come inside the house he only heard some movement in the house and he heard his voice.
66. When the witness went outside he saw the accused sleeping. The witness continued drinking till morning of 5 am and the sun was up. The witness agreed if anyone in the house walks he can hear the sound. When

questioned whether he had seen or heard the accused leave the house on the 16th when he was awake and drinking, the witness said *"I saw him come home and sleep."*

67. In cross examination the witness said when he went to sleep his bedroom door was closed but not locked, however, upon further questioning he changed his position to say the door was slightly open. He was in his room with his girlfriend having a special time and he did not wish to be disturbed.
68. When it was put to the accused he cannot be sure whether the accused was in the house in the morning of 16th April this witness said *"I can be sure he came to sleep when I saw him sleeping every time I came out"*.
69. This was the defence case.

ANALYSIS

70. The prosecution alleges that at about 5 to 6 am on 16th April, 2022 the complainant and her defacto partner Joseph Kaveni were sleeping in a corrugated iron house at Nanuku Settlement, Natabua. The house did not have a proper door but had a corrugated iron put across as a door.
71. The accused sneakily entered the house saw the complainant sleeping and he put his hand inside her panty and inserted his finger into her vagina. The accused was also sucking the complainant's breasts at the same time after he was able to lift her top and bra. The complainant did not react because she thought it was Joseph who was sleeping next to her.
72. The complainant was dragged from her sleeping mattress by the accused and it was only when the accused spoke that she realized it was not

Joseph. The accused said in Itaukei language "*lako mai magaitinamu*" meaning "*come here mother fucker*". The complainant opened her eyes and she directly looked at the accused and said "*who are you*". The accused responded in Itaukei by saying "*O iko saraga qo Amy au vaqarai iko tiko mai*" meaning "*so you are Amy, I have been looking for you.*"

73. The complainant resisted by trying to get away from the accused but she could not so what she did was, she shouted to her husband and also kicked him to wake him. The accused by this time had put his hands under her shoulders and had dragged her about 2 meters away towards the door from the mattress she was sleeping on.
74. The complainant did not consent for the accused to do what he had done to her. In the commotion Joseph woke up and at this time the accused ran outside. The complainant and Joseph gave chase and they saw the accused come out of his aunt's house pretending that he had not done anything. The incident was immediately reported to the police.
75. The prosecution further submitted that since the sun had risen and it was day light there was more than enough light for the complainant to see the accused. There was enough light inside the house through the windows so the complainant was able to recognize the accused.
76. The prosecution also states that this is a case of recognition since the complainant knows accused who was friends with her brothers and had been coming to her house and was treated like a family member. The accused was also very close to her face that she could smell liquor in the breath of the accused while he sucked her breasts so there is no way that she was mistaken about the accused.

77. Finally, the prosecution submits the complainant and Joseph had chased after the accused to his aunt's house where he was staying and both the complainant and Joseph were able to see the accused clearly at this time as well. Moreover, the complainant had immediately told Joseph about what the accused had done to her without any hesitation, in effect she had given a detailed of what the accused had done to her.
78. On the other hand, the defence says the allegations may be true but the complainant identified the wrong person as a result of a mistake made by the complainant and Joseph as to who the real perpetrator was. There is no way that it was the accused, he knows the complainant's family well since he is friends with the complainant's two brothers and he will never do such a thing.
79. How could he be at two places at the same time, he was sleeping at the house of his aunt since he was drunk after drinking from 8 pm in the night of 15th till 2 am the next day. The accused after buying a cigarette retired to his bedroom to sleep. When the complainant and Joseph came to his house the accused's aunt came to wake him but he could not get out of his bed since he was too drunk to wake up. All he wanted to do was to sleep comfortably.
80. The allegations are unfounded against the accused firstly, there are many other boys of his age, built and complexion in the settlement, anyone of them could have been the culprit. He does not know the complainant and he has never spoken to her in his life. Secondly, the accused did not know that the complainant would be sleeping in that lean to house so how could he be there to do what was alleged by the complainant.
81. The defence is asking this court to consider all the surrounding circumstances in which the complainant had identified the accused. The

evidence of the complainant speaks of a fleeting glance by a sleeping adult who was doped with lot of kava consumption. She only came to sleep about an hour before the alleged incident, her vision was hazed, and she was not consciously awake. To add to this there was nothing said by the complainant about the light in the house which adds to the difficulty in her identification of the accused and therefore she made a mistake when she thought it was the accused for someone else.

82. The complainant in her evidence said Joseph sleeps like a log which also creates a doubt on whether Joseph had actually seen the accused when suddenly woke up. It is far-fetched for the complainant to say that the accused was coming out of his aunt's house when she went to the accused aunt's house. Apenisa confirmed in no uncertain terms the accused was sleeping in the house at the time of the alleged incident.
83. Apenisa had been awake in the house and drinking with his girlfriend and whilst in his bedroom Apenisa was alert to movements in his house that he went and checked on the accused many times when he visited the toilet and so on. The complainant made an innocent mistake in this case.
84. The defence is asking this court to consider all the above holistically which creates a reasonable doubt in the prosecution case. The accused did not do anything as alleged. The complainant knew the accused so she had no choice but to blame the accused for someone else. The defence is asking this court not to believe the complainant on the important aspect of identification.

DEFENCE OF ALIBI

85. It is noted that the accused is relying on the defence of alibi. He took the position that at the time of the alleged incident he was sleeping in the

house of his aunt after a late night drinking. He was so drunk that he did not leave his aunt's house after he went to sleep at 2 am on the 16th and therefore he was not at the place of incident as alleged.

86. 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.

87. 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 sleeping at home.

88. 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.

89. 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

90. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence, still the prosecution must prove this case beyond reasonable doubt.
91. There are two different versions of what had happened, in this regard this court must consider all the evidence adduced to decide whether the prosecution has proven beyond reasonable doubt that the accused committed the offences alleged. It is not for this court to decide who is acceptable between the complainant and the accused.
92. This court has kept in mind the following factors when determining the credibility and reliability of a witness such as 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] see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022).
93. Brennan J in *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 has discussed the appropriate approach to be taken where there are conflicting versions of evidence given by the prosecution and the defence witnesses. Brennan J held that:

“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is

essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."

94. After carefully considering the evidence adduced by the prosecution and the defence, I believe the evidence of the complainant as truthful and reliable. The evidence of the complainant is plausible on the totality of the evidence in fact what she told the court is probable as well. In my observations I found the complainant to be a confident and a bold person who was able to express herself clearly about what the accused had done to her.
95. She was also steadfast in what she told the court. She knew the accused and she had seen the accused from a very close proximity he was on her sucking her breasts and had inserted his finger into her vagina and she was able to recognize the accused. The accused was friends with her brothers and he used to visit her home as well.
96. Furthermore both the complainant and Joseph had gone after the accused who had ended up at his aunt's house giving credence to what the complainant had told the court.

TURNBULL DIRECTIONS

97. Although this is a case of recognition as opposed to identification the defence has taken the position that the complainant made a mistake in thinking that it was the accused who had sexually assaulted her for someone else so she had identified the wrong person in court.
98. The defence contention is that the case against the accused in some respect depends on the correctness of the identification of the accused which the defence alleges to be mistaken. I have therefore taken special care on the evidence of identification because it is possible that an honest witness can make a mistaken identification. An apparently convincing witness can be mistaken and so can a number of such witnesses. I wish to also remind myself that mistakes in recognition, even of close friends and relatives, are sometimes made.
99. I have carefully looked at the following circumstances in which the complainant had identified the accused in her room:

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

She opened her eyes when the accused spoke and at this time she realized it was not Joseph she was able to recuperate herself and recognize the accused. The accused had not left her at this time but with both his hands under her shoulder had dragged her for about two meters from the mattress she was sleeping to the door. There is no time duration given by the complainant of her observations but she did say there was enough light coming into the room through the windows since the sun was up and she was able to see this person clearly.

At what distance?

According to the complainant she had seen this person from very close proximity. He was on top of her after lifting her top and bra he was sucking her breasts and also inserted his finger into her vagina.

In what light?

According to the complainant the alleged incident happened in the house which had windows the sun was up and it was basically day light and it was she able to see the face of this person clearly.

Did anything interfere with that observation?

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

Had the witness ever seen the accused before?

The complainant said that this person was a friend of her brothers who used to come to her house and sit under the breadfruit tree and talk and they were staying in the same settlement. The complainant knows the accused since he was in primary school.

100. I must remind myself of the following specific weaknesses which appeared in the identification/recognition evidence of the complainant. The complainant did not say for how long the accused was with her and what was in the voice of the accused which had been so characteristic of the accused. The complainant also did not say whether there was any light switched on in the house.
101. I have given the above directions as a matter of caution after the defence counsel raised the issue of identification of the accused inside the house by the complainant.

102. Finally, I would like to state that the complainant did not make any mistake in recognizing the accused since she has seen the accused on previous occasions and both were living in the same settlement. The complainant also knew the accused from the time he was in primary school. Another important aspect is that the complainant had immediately gone after the accused and she saw the accused at his aunt's house where he stays.
103. In view of the above, this court accepts that it was the accused and no one else and there was no mistake made by the complainant in the recognition of the accused.

DIRECTIONS ON VOICE RECOGNIZATION

104. Although there is strong element of visual recognition, however, I would also like to remind myself of the dangers of voice recognition which is more difficult than visual identification, and that the court should warn itself in a more stringent manner than that given in relation to visual identification. It is trite law that it is not necessary to hold a voice identification parade to render admissible evidence of identification by voice. In giving the judgment of the Court of Appeal in *R v O'Doherty* [2002] NI 263, [2003] 1 Cr.App.R.5 Nicholson LJ emphasized the need for a suitable warning in cases where evidence was given purporting to be identification of the voice of the accused in the following words:

"We are satisfied that if the jury is entitled to engage in this exercise in identification on which expert evidence is admissible, as we have held, there should be a specific warning given to the jurors of the dangers of relying on their own untrained ears, when they do not have the training or equipment of an auditory phonetician or the training or equipment of an acoustic phonetician, in conditions which may be far from ideal, in

circumstances in which they are asked to compare the voice of one person, the defendant, with the voice on tape, in conditions in which they may have been listening to the defendant giving his evidence and concentrating on what he was saying, not comparing it with the voice on the tape at that time and in circumstances in which they may have a subconscious bias because the defendant is in the dock. We do not seek to lay down precise guidelines as to the appropriate warning. Each case will be governed by its own set of circumstances. But the authorities to which we have referred emphasize the need to give a specific warning to the jurors themselves."

105. In this case the complainant did not give any specific details of accused voice which had made her sure that it was the accused hence I do not give much weight to this aspect of her evidence. Needless to mention, that the complainant's visual recognition is certain and acceptable hence the entirety of the recognition evidence of the complainant is not affected.
106. The complainant gave a comprehensive and consistent account of what the accused had done to her. She was also able to withstand cross examination and was not discredited as to the main version of her allegations.
107. The complainant was coherent and articulate in what she had encountered that early morning and I have no doubt in my mind that she told the truth in court. Her demeanour was consistent with her honesty.
108. Experience has shown that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not. The fact that the complainant initially did not react was because she thought it was her defacto partner it was only when the accused spoke that she realized it was someone else. When she opened

her eyes she saw the accused and then she started to resist and she woke Joseph by shouting and kicking him. The accused did not leave until Joseph woke up and that also gave the complainant and Joseph more time to see the accused.

109. I agree with the complainant that she had not consented to what the accused had done to her I also observed that the complainant had a strong view against the conduct of the accused on her and she had expressed herself clearly that she did not want the accused to do what he had done to her.

110. The complainant was not shaken as to the basic version of her allegations and both the prosecution witnesses were consistent in their evidence as well. The Court of Appeal made a pertinent observation in respect of the above in *Joseph Abourizk vs. The State, AAU 0054 of 2016 (7 June, 2019)* at paragraph 107 in the following words about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made 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...'

111. I also accept the complainant had immediately told Joseph about what the accused had done to her. Different people react differently to what they have gone through some respond instantly and some not. When asked by Joseph what was going on the complainant did not hesitate to tell Joseph about what the accused had done to her and the police were promptly notified.
112. The decisive aspect of recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. I accept the complainant was consistent in her conduct and in her explanation as well. As per the evidence of Joseph the complainant had given a detailed account of what the accused had done to her that morning.
113. On the other hand, the accused did not tell the truth he gave a version of events which is too good to be true or put simply did not have any iota of truth.
114. It appeared to me that the accused was rehearsing what he had planned to tell the court. He was not forthright in his answers under cross examination it was obvious to me that he was withholding information about his whereabouts in the morning in question.
115. In my considered judgment the accused was portraying a picture of a drunken youth who went home to sleep and could not wake up despite been woken up by his aunt. In addition to this, the accused was also presenting himself as a responsible individual that since he was friends with the complainant's brothers he would never do such a thing as alleged.

116. Apenisa the cousin of the accused made it obvious that this witness was supporting the accused without realizing that he was at odds with the evidence of the accused.
117. Apenisa did not tell the truth when he said it was the accused who had come into the house at midnight and had not left the house at any time thereafter does not make sense to me in light of the fact that this witness at around 5 am was having a private session with his girlfriend with the door of his bedroom closed and / slightly open.
118. It is also puzzling to note that this witness did not bother about the commotion that was going on outside his house apparently involving the accused if he was so concerned about the accused sleeping in the house throughout the morning.
119. When considering the evidence of the accused and his cousin Apenisa they were at odds with each other in the following manner:
- a) Accused said he came home at about 2 am whereas Apenisa said the accused came home at around midnight;
 - b) Apenisa said he went to his bedroom at around 5 am and was in a private session with his girlfriend and he did not wish to be disturbed so the door of the bedroom was closed and yet he kept on checking on the accused is not probable. The witness changed his position to the door being slightly opened when he realized what he had said.
 - c). The accused did not say in his evidence that he went into the kitchen first before going to bed and he did not say anything about talking to anyone yet Apenisa said he was able to recognize the voice of the accused is a unbelievable and a made up story.

120. I do not give any weight to the evidence of the accused and his cousin Apenisa who were acting in concert to tell the court a version of events which unfortunately did not add up. Both were trying to overshadow the real facts to make their version of events look trustworthy and reliable.
121. The defence was also diverting attention away from the accused by dragging the similarity features of other boys in the same settlement as being the possible culprit other than the accused.
122. I do not accept that the allegations were 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 Apenisa 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.
123. This court accepts the evidence of both the prosecution witnesses as reliable and credible. The defence has not been able to create a reasonable doubt in the prosecution case in respect of both counts.

CONCLUSION

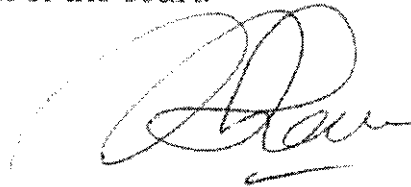
124. This court is satisfied beyond reasonable doubt that the accused on 16th April, 2022 had penetrated the vagina of the complainant without her consent. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
125. Furthermore, this court is also satisfied beyond reasonable doubt that the accused on the same date unlawfully and indecently assaulted the complainant by sucking her breasts which was sexual in nature. In

respect of the above offence this court is also satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse and indecently in what he did to the complainant.

126. The act of the accused was indecent and sexual that any right minded person would consider such conduct indecent and sexual in nature. The complainant did not consent to the above mentioned acts of the accused.

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

128. This is the judgment of the court.



Sunil Sharma

Judge



At Lautoka

20 November, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.