

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

**Criminal Case No.: HAC 113 of 2023**

**STATE**

**V**

**R. D [ACCUSED]**

**Counsel** : Mr. S. Seruvatu for the State.  
: Ms. Priyanka for the Accused.

**Dates of Hearing** : 13 December, 2023  
**Closing Speeches** : 18 December, 2023  
**Date of Judgment** : 18 December, 2023

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**JUDGMENT**

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*(The name of the complainant and the accused are suppressed they will be referred to as "P.P" and "R.D" respectively)*

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

***Statement of Offence***

**RAPE**: Contrary to section 149 and 150 of the Penal Code.

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

R.D on the 8<sup>th</sup> day of August, 2009 at Nadi in the Western Division, penetrated the vagina of “P.P” with his penis, without her consent.

2. In this trial, the prosecution called one witness 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 vagina of the complainant with his penis;
  - (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 penis

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 penis.
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 means of false representations as to the nature of the act, or in the case of a married woman, by impersonating her husband then that consent is no consent at all.
9. If this court is satisfied that the accused had penetrated the vagina of the complainant with his penis 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 accused had penetrated his penis 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 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 in the year 2009 she was 15 years of age and a student. On 8<sup>th</sup> August, 2009 she was alone at home

since her parents had gone to Ba. At around 10 am the accused, her father's friend (who she called uncle) came home.

18. The complainant was at her sister in law's house which was next to her house (who she called aunt) saw the accused going towards her house. When inside her house the accused told her to mix some grog which the complainant did. After this the complainant went back to her sister in law's house to assist with some household chores after sometime when the complainant went to her house she saw the accused in the sitting room. The accused called the complainant, when she went to him he started saying that he wants her, he likes her and then he started touching her.
19. By this time the accused was standing and he tried to hug the complainant. She tried to move back and she said "*what you doing*". The complainant and the accused were standing between the sitting room and the bedroom. The accused pushed the complainant on the bed and again he said that he wants her. The complainant was wearing shorts, panty, a top and bra.
20. The accused pulled her down and removed her shorts and panty and also he removed his pants. According to the complainant she was short and skinny at the time and the accused was huge and he was able to push and pull the complainant with one hand. The complainant was trying to move and go away but she could not and she was also saying "no" to the accused. The accused penetrated her "pussy" meaning vagina with his dick meaning his penis.
21. It was painful and as a result she was pushing the accused but she could not because he was on top of her. The accused at this time was angry and aggressive he pushed and pulled his penis into her vagina two or three

times and only stopped when her sister in law started to call her. The accused left the complainant after wearing his pants. The complainant wore her shorts and went to her sister in law's house and she told her sister in law about what the accused had done to her she said *"he was doing that to me and when you called then he left me and went."*

22. Upon hearing this, the complainant's sister in law called the police and her parents. The matter was reported to the police the same day. The complainant did not consent to what the accused had done to her since she was not ready for sex at the time. The complainant recognized the accused and pointed to him in court.
23. In cross examination the complainant said the accused and her father were good friends and the reason why the accused had come to her house that morning was because her father had told the accused that she will be alone at home and he was to be with her. The complainant agreed that when she was pushed on the bed she had screamed.
24. The complainant stated that her sister-in law had sworn at the accused after he did not respond to her sister in law's call for the accused to stop when he was leaving her house after the incident. The complainant denied that the accused left her house because her sister in law was swearing at him and not because anything had happened.
25. According to the complainant she had not asked for \$10.00 from the accused that day but the accused had on his own given it to her. The complainant also stated that she had told her father she did not want the accused to come home. The complainant denied that she made up the allegation against the accused because she did not like that her father had asked the accused to come home that day.

26. This was the prosecution case.

### **DEFENCE CASE**

27. 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. This court must also consider his evidence and give such weight as is appropriate.
28. The accused informed the court that he knows the complainant and her family for the past 13 years and at the request of the complainant's father he had on 8<sup>th</sup> August, 2009 gone to the complainant's house to take care of her.
29. When he arrived at the complainant's house he asked her to mix some grog for him. At around 10.30 am the complainant's sister in law who lived not too far away from the complainant's house called the complainant to help her with her household chores.
30. At about 2.30 pm the complainant returned to her house by this time the grog finished and he asked her to mix some more. After mixing the grog the complainant came and sat beside him in the sitting room and asked for some money for her fare. The accused gave the complainant \$10.00. This was not the first time the complainant had asked for money from him. On previous occasions he had given her \$5, \$6 or \$10. The accused and the complainant continued talking and it was around 3 pm the complainant's sister in law came into the house and all of a sudden started swearing at him.

31. The accused got up wore his shoes and left. He left at around 3.15 pm and later he informed the complainant's parents about this incident. The accused and the complainant's father were like brothers, they were cutting cane together and he had a good relationship with the complainant's family. The accused stated that he did not rape the complainant as alleged.
32. In cross examination the accused said he did not know why the complainant's sister in law was swearing at him. He denied the reason was because of what he had done to the complainant. The accused agreed that at the time he was bigger than the complainant. The accused denied the allegation raised against him by the complainant.
33. This was the defence case.

### **ANALYSIS**

34. The prosecution states that the complainant and the accused are known to each other. The complainant's father and the accused were friends and the complainant used to call the accused uncle. In the year 2009 the complainant was 15 years of age, on 8<sup>th</sup> August, 2009 the complainant was alone at home.
35. At around 10 am the accused came to her house and told her to mix some grog for him which the complainant did. After sometime the accused called the complainant, when she went to him the accused started saying that he wants her, he likes her and then he started touching her.
36. By this time the accused was standing and he tried to hug the complainant who tried to move back to avoid him. The complainant and the accused were standing in the middle of the sitting room and the bedroom. The



accused pushed the complainant on the bed and again said he wanted her.

37. The accused forcefully removed the complainant's shorts and panty and also removed his pants. Despite resistance by the complainant the accused after overpowering her penetrated her vagina with his penis and had forceful sexual intercourse.
38. Since it was painful the complainant was pushing the accused but she could not do anything because he was on top of her. The accused was angry and aggressive he only stopped after her sister in law started to call her. The accused immediately left the complainant's house. The complainant did not consent to what the accused had done to her and the matter was reported to the police the same day.
39. On the other hand, the defence says the allegation is a made up story narrated in court by the complainant. What the complainant told the court is not realistic and probable. The accused did not do anything to the complainant as alleged. The sister in law of the complainant is the one who sneakily entered the complainant's house when the accused and the complainant were sitting together and had started swearing at the accused for nothing. The accused was surprised by this outburst.
40. The accused was at the complainant's house at the request of the complainant's father and this was not the first time the accused had been with the complainant in her house when she was alone. The swears by the sister in law were so vulgar that the accused had no choice but to leave the complainant's house which he did.

41. The accused did not do anything to the complainant as alleged she lied in court and had not told the truth about what had actually happened. The behaviour of the complainant's sister in law was so unbecoming that the accused had no option but to leave the complainant's house. The complainant also made this allegation because she did not want the accused to be at her house so to get rid of the accused she made this allegation.
42. Finally the defence is saying that the accused had promptly told the complainant's parents that he had left their house due to the attitude and improper behaviour of the complainant's sister in law. The accused did not do anything as alleged. The complainant had lied to the court about the allegation since she did not want the accused to be at her house. The defence is asking this court not to believe the complainant.

### **DETERMINATION**

43. 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.
44. In this case, there are two different versions of the event, 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 offence alleged. It is not for this court to decide who is acceptable between the complainant and the accused.

45. 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).

46. 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.”*

47. This court has also taken into account the observations made by the Court of Appeal in *Rokocika v The State* [2023] FJCA 251; AU0040.2019 (29 November 2023) regarding what the accused told the court at paragraph 45 as follows:

*The Liberato direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused’s account (second aspect): Park v R [2023] NSWCCA 71 at [102]–[103].*

48. The defence brought about a motive on the part of the complainant to lie since she did not want the accused to come to her house and therefore she had made a story to falsely implicate the accused. In respect of the above contention I have directed my mind to the Jovanovic direction to remind myself that an accused has no burden to prove a motive or reason for complainant to lie.

49. The Court of Appeal in *Rokocika’s* case (supra) from paragraphs 32 to 34 made a pertinent observation in respect of the above as follows:

*In R v Jovanovic (1997) 42 NSWLR 520 Sperling J set out a draft direction that emphasised that:*

*“It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about’.*

*[33] The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:*

*'If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: Jovanovic v R at 523.*

*[34] NSW Criminal Trial Courts Bench Book also states that:*

*'A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: South v R [2007] NSWCCA 117 at [42]; MAJW v R [2009] NSWCCA 255 at [31].'*

50. After carefully considering the evidence adduced by the prosecution and the defence, I believe the evidence of the complainant as truthful and reliable. She gave a cogent and coherent account of what the accused had done to her. The complainant was also able to withstand cross examination and was not discredited as to the main version of her allegation.
51. The complainant was unwavering in what she had encountered in her house that day. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty. In cross

examination she was not evasive and had given frank answers to the questions asked. I also accept the complainant was consistent in her evidence as well.

52. I accept that it was the accused who had forcefully penetrated the complainant's vagina with his penis without her consent and the complainant had expressed herself clearly about what the accused had done.
53. I also accept the complainant had immediately reported the matter to the police the same day. During the cross examination of the complainant it was noted that there were no material inconsistencies brought up between what the complainant told the court and her police statement. I have nevertheless directed my mind to the previous inconsistent direction as follows:

#### **PREVIOUS INCONSISTENT STATEMENT**

54. This court also directs its mind to the fact that the defence counsel during cross examination of the complainant had questioned the witness about some inconsistencies in her police statement she had given to the police when facts were fresh in her mind with her evidence in court.
55. This court is allowed to take into consideration the inconsistencies between what the witness told the court and her police statement when considering whether the witness was believable and credible. However, the police statement is not evidence of the truth of its contents.

56. 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.
57. 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 witness. 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.
58. The inconsistencies were in respect of when the complainant had gone to the house of the sister in law, number of times she had done so, the time she returned to her house and so on were not significant to adversely affect the credibility or the thrust of the complainant's evidence in respect of the allegation raised.
59. 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;”*

60. 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...’*

61. The complainant was giving evidence after 14 years of the incident hence there were bound to be some inconsistencies or omissions. In any event the inconsistencies raised during the cross examination of the complainant were on peripheral issues.



62. 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 did not do anything to the complainant and he had left because the complainant's sister in law was swearing at him as unworthy of belief.
63. The accused was not straight forward in his answers during cross examination, he was trying to avoid answering the questions posed. He did not tell the truth when he said he left the complainant's house after the complainant's sister in law without any reason had started swearing at him.
64. I do not give any weight to the evidence of the accused he was trying to outdo the real facts to make his version of events look trustworthy and reliable.
65. I do not accept that the allegation was made up by the complainant to falsely implicate the accused. The complainant knew the accused from a long time and she used to call the accused uncle. She had also obliged to the request of the accused to mix grog for him showed the respect and obedience of the complainant towards the accused.
66. The defence has not been able to create a reasonable doubt in the prosecution case in respect of the offence as charged.

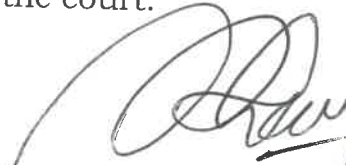
## **CONCLUSION**

67. This court is satisfied beyond reasonable doubt that the accused on 8<sup>th</sup> August, 2009 had penetrated the vagina of the complainant with his penis

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.

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

69. This is the judgment of the court.



**Sunil Sharma**  
**Judge**



**At Lautoka**

18 December, 2023

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**