

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 180 of 2022

STATE

V

MATAIASI CURU

Counsel : Mr. U. Lal for the State.
: Ms. L. Taukei for the Accused.

Dates of Hearing : 14, 15, 16 February, 2024
Closing Speeches : 20 February, 2024
Date of Judgment : 21 February, 2024

JUDGMENT

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

1. The Director of Public Prosecutions charged the accused by filing the following amended information dated 24th October, 2023:

COUNT ONE

Statement of Offence

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

Particulars of Offence

MATAIASI CURU between the 5th of November 2022 and the 6th of November 2022, at Lautoka in the Western Division, unlawfully and indecently assaulted “I.S”, by licking her breast.

COUNT TWO

Statement of Offence

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

Particulars of Offence

MATAIASI CURU between the 5th day of November 2022 and the 6th of November 2022, at Lautoka in the Western Division, penetrated the mouth of “I.S” with his penis, without her consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

MATAIASI CURU between the 5th of November 2022 and the 6th November 2022, at Lautoka in the Western Division, inserted his penis into the vagina of “I.S”, without her consent.

COUNT FOUR

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to section 275 of the Crimes Act 2009.

Particulars of Offence

MATAIASI CURU on the 8th of November 2022, at Lautoka in the Western Division, assaulted “I.S” causing her actual bodily harm.

COUNT FIVE

Statement of Offence

BREACH OF DOMESTIC VIOLENCE RESTRAINING ORDER: Contrary to section 77 (1) (a) of the Domestic Violence Act 2009.

Particulars of Offence

MATAIASI CURU between the 5th November 2022 and the 8th of November 2022, at Lautoka in the Western Division, after being bound by domestic violence restraining order number 374/22 dated 11th October, 2022, without reasonable excuse, contravened the said order by physically assaulting and sexually abusing “I.S”, the protected person.

2. In this trial, the prosecution called four witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of all the offences 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

SEXUAL ASSAULT

4. To prove count one 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 by licking/sucking her breast.
5. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.
6. 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.
7. The final element of assault is the unlawful use of force on the complainant by licking/sucking her breast.

In this regard this court has to consider:

- (a) whether the force used in licking/sucking the complainant’s breast 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.
8. 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 licking/sucking her breast.

9. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then this court must find the accused guilty of sexual assault. 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.

RAPE

10. To prove counts two and three the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
- (a) The accused;
 - (b) Penetrated the mouth and the vagina of the complainant with his penis respectively;
 - (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.
11. In this trial, the accused has denied committing the offences of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the mouth and the vagina of the complainant with his penis respectively 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.
12. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.
13. The second element is the act of penetration of the complainant's mouth and vagina by the penis. This element is also not in dispute.

14. The third element of consent is in dispute, which 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, 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.
15. If this court is satisfied that the accused had penetrated the mouth and the vagina of the complainant with his penis respectively 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.
16. 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.
17. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated the complainant's mouth and vagina with his penis without her consent then this court must find the accused guilty as charged.
18. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences of rape, then this court must find the accused not guilty.
19. The slightest of penetration of the complainant's mouth and vagina by the accused penis is sufficient to satisfy the act of penetration.

ASSAULT CAUSING ACTUAL BODILY HARM

20. To prove count four the prosecution must prove the following elements of the offence of assault causing actual bodily harm beyond reasonable doubt:
 - (a) The accused;
 - (b) Assaulted the complainant;
 - (c) Causing actual bodily harm.

21. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.

22. The second element is the act of assault on the complainant. Assault is the unlawful use of force on the complainant.

23. The final element is the actual bodily harm or injuries caused to the complainant.

24. If this court is satisfied that the accused had assaulted the complainant by pushing the complainant against the grill door causing her injuries then this court must find the accused guilty of the offence of assault causing actual bodily harm. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of assault causing actual bodily harm then this court must find the accused not guilty.

BREACH OF DOMESTIC VIOLENCE RESTRAINING ORDER

25. To prove count five the prosecution must prove the following elements of the offence of breach of Domestic Violence Restraining Order beyond reasonable doubt:
 - (a) The accused;

- (b) Breached DVRO no. 374/22 of the Magistrate's Court dated 11th October, 2022;
- (c) By physically assaulting and sexually abusing the complainant a protected person.
26. If this court is satisfied that the accused had breached the Domestic Violence Restraining Order number 374/22 of the Magistrate's Court dated 11th October, 2022 by physically assaulting and sexually abusing the complainant a protected person then this court must find the accused guilty of the offence of breach of Domestic Violence Restraining Order.
27. If on the other hand there is a reasonable doubt with regard to any of those elements concerning the offence of breach of Domestic Violence Restraining Order then this court must find the accused not guilty.
28. As a matter of law, I direct myself that offences of sexual nature as in counts one, two and three 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.
29. In this case, the accused is charged with five offences, 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 others as well. This also applies to the outcome of not guilty.

ADMITTED FACTS

30. In this trial, the prosecution and the defence have agreed to certain facts titled as amended admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
31. 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

32. The complainant informed the court that since 2013 she had been in a defacto relationship with the accused. On 5th November, 2022 around 10pm the complainant arrived at the gate of her rental flat in the car owned by her and the accused.
33. The complainant was in the car with her two nephews waiting for the landlord to open the remote gate. Whilst waiting the accused came out of the small gate and ran towards the car shouting for her to get out of the car. Three weeks ago the accused had left the complainant and was staying elsewhere.
34. When the accused was near the car the complainant's two nephews got out, however, the complainant was sitting in the car when the accused came towards her side. At this time she got out of the car because she was scared. After getting out of the car the complainant and her two nephews were standing beside the gate.

35. The accused got into the driver's seat, and after sometime he called the complainant to go for a ride in the car. The complainant refused. After both her nephews left, the complainant was alone sitting outside the gate by now it was nearly 2am the next day. The accused spoke nicely to the complainant so she went and sat in the front passenger seat of the car the accused said that he wanted to apologize.
36. Thereafter the accused turned around to put his arms around her the complainant thought the accused was going to apologize to her but instead the accused started to kiss her by leaning towards her and getting on her chest. The complainant refused so the accused started to get forceful.
37. At this time the accused pushed her top and bra upwards and sucked her nipples when the accused did this the complainant felt bad and abused. She told the accused twice to stop since he was getting rough and his hands were going down to her jeans. The accused stopped straightened up and sat on his seat again. The accused said that he was going to spend the night with her the complainant did not say anything. Once inside the house the accused said he was hungry so the complainant went in the kitchen followed by the accused.
38. In the kitchen the accused pushed down his shorts and pushed the head of the complainant towards his penis and told her to suck it. The complainant did as she was told because she was scared of the accused.
39. Upon further questioning the complainant said that she didn't say "yes" to suck the accused penis she further stated *"I am a human being I am not a piece of wood that he abuses and come and wants to have sex to satisfy himself."*

40. After this, the accused held the complainant's arm and walked towards her bedroom. In the bedroom the accused pushed the complainant on the bed she fell face down, the accused came from behind lifted her top, removed her jeans by lifting her slightly and penetrated his penis into her vagina, the complainant said "no" twice but the accused did not stop she felt bad because what the accused was doing was against her will and she did not like what he was doing to her.
41. When asked why she said she did not like what the accused was doing the complainant *replied "it was not an act of love it was more of abuse, more like I was being used."* When asked to elaborate what she meant by *"it was more like abuse"* the complainant said *"I know the difference because I know when it's consensual and it's different. He was rough even though I stopped him he didn't stop. It was rough I felt pain but still he continued."*
42. In respect of the injuries in her finger the complainant stated that in the morning of 8th November she wanted to go to town when she told the accused he got angry she was near the grill door in the porch which had mesh wire protruding on the side. When the accused pushed her she came in contact with the sharp mesh wire and she fell on the floor. Blood started to come out of the injured finger, the complainant stood up left the house and went to the Vitogo Police Post to report about what the accused had done. When the complainant was on the floor the accused did not do anything and he went inside the house.
43. The complainant was medically examined the same day and sent home. After a few days the complainant went to the remand centre since she had received information that the accused wanted his clothes. At the remand centre she was not able to see the accused since clothes were not allowed

to be taken in the corrections facility. The complainant was told by the corrections officers to bring fruits.

44. During the next visitation the complainant took some fruits to meet the accused at the remand centre. According to the complainant the accused was apologetic and he sought forgiveness but the complainant did not want to continue in the relationship. The complainant stated that she met the accused 4 or 5 times at the remand centre. The complainant also visited the accused at the cell block for the accused to sign a LTA document in relation to the car.
45. The complainant also stated that on 11th October, 2022 an interim DVRO was issued by the Magistrate's Court to protect her from the accused. The complainant identified the accused in court.
46. In cross examination the complainant agreed that she had a steady defacto relationship with the accused for the last 10 years. The accused was financially supporting the complainant even though she was doing her own business of selling BBQ. The complainant also agreed that although the car was registered in her name as a co-owner it was the accused who had purchased the car with his money. In respect of the interim DVRO she had filed in October, 2022 the accused was served with the same. When the accused left the house he took the car with him.
47. In respect of the first incident when it was suggested the accused after getting into the car came to the passenger's side to apologize to her the complainant denied this, and stated that the accused did not get out of the car but had leaned towards her. She thought he will apologize but instead he started to hug her. Furthermore, the complainant said that

before going into the house the accused had told her to keep the car keys and in the morning they will decide what to do about the car.

48. The complainant said that it was a lie when it was suggested the accused had knelt down and tried to apologize. The complainant was referred to her police statement dated 8th November, 2022 to page 2, line 11 which was read as:

“I then went and sat beside him in the vehicle on the front passenger seat. Mataiasi got off the vehicle and came to my side of the vehicle. He opened the car door and crunched down. I thought he came to apologize but he suddenly came on me to kiss me.”

49. The complainant stated that what was written in the police statement was correct and what she told the court was due to the fact that she had forgotten. When it was put to the complainant that she had lied in court the complainant denied this and she explained *“I am just sticking to the point where it happened. I can’t be focusing on I was asked exact thing happened most of the details I didn’t remember just small details but what he actually did how I can forget.”*

50. The complainant denied that the accused upon entering the house had his shower and was drying himself with a towel when she went inside the bedroom. The complainant also denied that she had initiated oral sex on the accused by kneeling on the floor and putting his penis in her mouth for 6 minutes. The complainant said that it was a lie she had not done so as suggested by the defence, when it was suggested that the accused never threatened or physically hurt her at this time, the complainant did not agree and said *“he grabbed me, he forced me to suck his penis in the kitchen. He grabbed my head and pushed it down and then in the bedroom.”*

51. The complainant did not call for help or scream for assistance from her nephew who was sleeping in the next room because she did not want her nephew to see his uncle naked. The complainant denied that she had consented to have sexual intercourse with the accused after oral sex. The complainant said she did not enjoy having sexual intercourse with the accused and she had not given love bites to the accused.
52. On 8th November the complainant wanted to report the matter to the police she was in the porch with the accused. After a while both had an argument. During the course of the argument the accused said to the complainant that she was eating for free and that she should start contributing towards the expenses. Upon hearing the above the complainant got upset.
53. The complainant denied that her finger got injured when the accused wanted to come inside the house to take his wallet, and to stop the accused from doing this, she was pulling the grill door and at this time she injured her finger with the mesh wire in the grill door and also fell on the floor.
54. The complainant agreed after her finger got injured she left the house. The complainant also agreed that she had gone to see the accused at the remand centre but she had not apologized for reporting against the accused. The complainant further said *"I did not he is the one who told me to lie for him that he did not commit to that."*
55. The complainant did not agree that at the remand centre they had also discussed about their future together and for the accused to marry her legally. She did not want to reconcile with the accused but there was discussion about the car and the properties they owned.

56. The complainant also visited the accused at the cell block as well and on one occasion the accused had given his ATM card and PIN for the maintenance of the car, however, she was unable to withdraw the money. She denied that she had taken a document for the accused to sign his bank details. The complainant did not agree that by bringing with her fruits, food, his clothes, soap and shaving gear meant she cared for the accused. According to the complainant it was the accused who had wanted all the items she took with her and not a sign of regret by her.
57. The complainant was again asked if the accused had raped her she would have screamed or sought help from the landlord or her nephew who was sleeping in the house. The complainant agreed that her landlord was there if she would have screamed her nephew would have seen both her and the accused naked and she would not have liked that since she was living with her nephew. The complainant did not agree that she had lied about the allegations. The complainant maintained that all the allegations had happened. The complainant also did not agree that the accused had not forcefully sucked her nipple inside the car.
58. In re-examination the complainant said that inside the car she did not scream because she was scared of the accused.
59. The second witness Salome Daunivalu graduated with an MBBS degree from the Fiji School of Medicine and Post Graduate Diploma in Public Health from University of Brehemtan in U.K. On 8th November, 2022 the witness had examined the complainant at the Medical Services Pacific Clinic. The Fiji Police Medical Examination Form of the complainant dated 8th November, 2022 was marked and tendered as prosecution exhibit no. 1.

60. According to the witness the complainant was crying and emotional in the clinic her specific medical findings were:
- a) Pain on the back and shoulder;
 - b) Hymen not intact;
 - c) Laceration and abrasion were noted at posterior fourchette and fossa navicularis.
61. The witness stated that the posterior fourchette is the external genitalia whereas fossa navicularis is the internal genitalia. The witness had also illustrated her findings in a diagram at appendix one.
62. In the professional opinion of the witness the injuries seen were most likely caused by a blunt force trauma likely to be forceful penetration and the injuries were within 48 hours. The witness said in this case she had seen multiple injuries.
63. The complainant told the witness on 5th November, 2022 her defacto partner had pulled her clothes apart, forcefully sucked her breast dragged her in the living room pulled down her pants telling her to suck his penis. He took her to the bedroom forced her to take off her clothes pushed her on the bed and performed vaginal and oral penetration.
64. In cross examination the witness stated that it is unlikely that the laceration seen were as a result of consensual sexual intercourse because injuries were also seen in the internal genitalia. The witness also stated that in consensual sex it is unlikely that abrasions will be seen.
65. The third witness Kaushal Kumar informed the court that he graduated with an MBBS degree, Post Graduate Diploma in Public Health and Masters in Public Health from the Fiji National University. Currently the

witness is employed in a private medical clinic, however, from 2019 to 2023 he was a Medical Officer employed by the Ministry of Health based at the Punja's Health Centre.

66. On 8th November, 2022 the witness had examined the complainant at the Punja's Health Centre. The Fiji Police Medical Examination Form of the complainant dated 8th November, 2022 was marked and tendered as prosecution exhibit no. 2. The complainant had told the witness that she was sexually harassed by her defacto partner on 5th November and also harassed on Tuesday 8th November.
67. The witness had noticed that the complainant was calm, cooperative, emotional and crying. Upon examination and as informed by the complainant the witness saw laceration on her right index finger. According to the witness the laceration was 3cm cut on the palm aspect of the index finger, long cut but not deep. Since the injury was bleeding the witness said the injury could have been less than an hour.
68. In cross examination the witness said that the complainant had told him the finger laceration was from being pushed on the floor. When asked if pulling on the mesh wire grill door could also cause laceration the witness said a lot of force was required to cause a laceration.

RECENT COMPLAINT EVIDENCE

69. Complainants 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.

70. 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 would be given to the fact that the complainant told Dr. Kumar and Dr. Daunivalu on 8th November, 2022 about what the accused had done to her.
71. This is commonly known as recent complaint evidence. The evidence given by Dr. Kumar that the complainant told him she was sexually harassed by her defacto partner on Saturday 5th November and in much greater detail to Dr. Daunivalu is not evidence of what actually happened between the complainant and the accused since these witnesses were not present and did not see what had happened between the complainant and the accused.
72. 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 Dr. Kumar and in more detail to Dr. Daunivalu that the accused had forcefully sucked her breast told her to suck his penis and forcefully performed vaginal and oral penetration on her.
73. The complainant although in a distressed state had without hesitation told Dr. Daunivalu about what the accused had done. The complainant gave relevant and important information about what the accused had done which was sufficient for the doctor to undertake her medical examination. The prosecution also says there was no need for the complainant to go into every detail of what had happened to her. What she relayed to the doctor

was forceful sexual conduct of the accused on her and therefore she is more likely to be truthful.

74. On the other hand, the accused says the complainant had made up a story against him after allowing the accused to suck her breast and have consensual oral and penile sexual intercourse. The complainant got upset and angry when during breakfast on 8th November the accused made a remark unintentionally that she was eating for free without contributing. The complainant got offended and as a result she did not tell the truth to both the doctors that she had consented to what the accused had done. The defence is also asking this court to consider the different version she told Dr. Kumar and another version to Dr. Daunivalu therefore she should not be believed.
75. It is for this court to decide whether the evidence of recent complaint helps in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is a matter for this court to decide whether it accepts the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.

EXPERT EVIDENCE DIRECTION

76. This court has heard the evidence of Dr. Daunivalu and Dr. Kumar who were called as experts on behalf of the prosecution. 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 reports of the

complainant is before this court and what the doctors said in their evidence as a whole is to assist this court.

77. 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 doctors. 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 experts it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctors.
78. This evidence of the doctors relate 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.
79. The final witness Osea Vuniyayawa informed the court that he is employed as an Assistant Court Officer based at Magistrate's Court, Lautoka. As part of his duties he also looks after all the DVRO cases.
80. In this case the witness had served an interim DVRO issued against the accused by the court on 11th October, 2022. The interim Domestic Violence Restraining Order was marked and tendered as prosecution exhibit no.3. According to the witness the DVRO case number in the Magistrate's Court was 374 of 2022.
81. After the service of the orders the witness had signed an affidavit of service which was marked and tendered as prosecution exhibit no. 4.

82. The witness further stated that he had thoroughly explained to the accused the Domestic Violence Restraining Order and the consequences if he breached those orders. The contents of the order being section 27 of the orders were also explained to the accused by him. The service of the DVRO was done at the Magistrate's Court Registry. The accused did not sign or acknowledge receipt of the interim domestic violence restraining order. The witness identified the accused in court.
83. In cross examination the witness stated that they did not get the respondent's to sign a document to confirm that they have received the DVRO. The affidavit of service is the only document that is filed in court to confirm that the respondent had received the orders.
84. This was the prosecution case.

DEFENCE CASE

85. 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 the accused evidence and give it such weight as is appropriate.
86. The accused informed the court that he was in a defacto relationship with the complainant from 2013. He was the one who was supporting the complainant financially. On 5th November, 2022 he was living with one of his friends in Namoli after he was served with a Domestic Violence Restraining Order.

87. In the afternoon of the 5th the accused was informed that the complainant had taken possession of the car. The accused went to report the matter at the Market Police Post but the police officers were not of any assistance.
88. It was after 10pm the accused arrived at the flat where the complainant was renting she was not there so he waited. Shortly after, his car driven by the complainant's nephew Pana, with the complainant and another nephew Inia came. The complainant was seated in the front passenger's seat.
89. The accused approached the driver Pana to give him the car keys but Pana did not, instead he gave the keys to the complainant. The accused then asked the complainant to give him the keys so that he can take the car. She refused and started to raise her voice. The accused requested her to speak at a low voice since the neighbours were sleeping. As the discussion continued things cooled down so the accused asked to apologize for all the things that had happened.
90. After saying this, the accused went to the other side of the car that is to the passenger side where the complainant was sitting. He opened the door to apologize but the complainant didn't accept his apologies, again the accused asked the complainant to give him the car keys but the complainant refused.
91. Both then sat in the car since it was early morning he asked the complainant if they could go and sleep in the house. Before entering the house the accused asked the complainant if there was any dinner left, she replied there were some leftovers so she went inside the kitchen heated the food and prepared them on the table. At this time, the accused went

into the bedroom removed his clothes and put on a towel and had his shower.

92. When the accused was drying himself the complainant came into the bedroom touched his back, came in front and started touching his towel and his penis, at this time he slackened his towel. The complainant got hold of his penis and started sucking it for 2 to 3 minutes. After this both went on the bed the complainant was facing upwards while lying down. The accused removed her clothes jumped on her and had sexual intercourse for more than 6 minutes.
93. According to the accused on Tuesday 8th November, he was woken by the complainant to have breakfast she had prepared. Both had breakfast together and where discussing small scale food selling business for the complainant, the accused said that the complainant was eating for free and she should start contributing. This made the complainant angry and upset, she started shouting and she went inside the house. The accused also followed her inside had his shower changed his clothes and came out of the house.
94. The complainant also changed her clothes and got her bag. When outside the house he remembered his wallet was in the flat. The complainant was at the grill door she got hold of the chain to lock the door and whilst she was locking the door with the chain he told her about his wallet. The accused went and pulled open the grill door which caused the injuries to the complainant's hand. The accused went into the house and got his wallet and left for town.
95. Furthermore, the accused stated that the complainant had visited him at the remand centre, cried and apologized about reporting the incident to the police. The complainant also told him that she had been to the police

station to withdraw her complaint but that could not be done because he had been interviewed and charged.

96. The accused further stated that the complainant requested him to forgive her for what had happened. Both talked about their future together and she brought him toilet paper, bathing soap, shaving gear and some fruits. The accused said when he saw the complainant at the remand centre she appeared sad and hurt because he was in remand.
97. The accused also stated that the complainant came to see him at the cell block and she had brought the LTA form to be signed by him in respect of the car. According to the accused the complainant had visited him many times at the remand centre and the cell block. On one occasion he had given the complainant his ATM card and PIN number to do some payments.
98. In respect of the interim DVRO the accused said *“I was only given a document and told it was DVRO, I did not really read the documents all I know it was a DVRO, no one explained to me that’s when I packed my stuff and left home.”*
99. The accused denied all the allegations raised against him by the complainant.
100. In cross examination the accused said he was legally married to someone else and he has three children from his marriage. His wife and children lived in Suva.
101. The accused stated that he had a healthy relationship with the complainant and everything was fine. When questioned why a DVRO was

issued by the court in favour of the complainant if everything was fine the accused said *“DVRO was issued to me because of something else.”*

102. The accused agreed a DVRO was issued against him and it was served on him upon further questioning the accused changed his position to say that he does not recall being served with a DVRO. The accused was referred to his caution interview dated 8th November, 2022 to Q.&.A 102 as follows:

Q: According to Osea Vuniyayawa he stated that he served you the DVRO form that was applied by your defacto partner and he explained to you everything in regard to the DVRO. What can you say?

A: Yes.

103. Upon hearing this, the accused agreed that the DVRO was served on him by Osea and it was explained to him and he understood the purpose of the DVRO. The accused also agreed that when he left the driver’s seat he did not apologize to the complainant. The accused denied committing the offences raised against him.
104. On re-examination the accused stated that when he was having sexual intercourse with the complainant she was okay with it. When asked to clarify why he had sought forgiveness from the complainant the accused said he had asked her to forgive him for what had happened.

PREVIOUS INCONSISTENT STATEMENT

105. This court also directs its mind to the fact that the defence counsel during cross examination of the complainant and the state counsel during the cross examination of the accused had questioned these witnesses about some inconsistencies in her police statement and his record of interview

respectively they had given to the police when facts were fresh in their minds with their evidence in court.

106. This court is allowed to take into consideration the inconsistencies between what the witnesses told the court and their police statement and record of interview when considering whether the witnesses were believable and credible. However, the police statement and the record of interview were not evidence of the truth of its contents.

107. 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.

108. 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.

109. This was the defence case.

ANALYSIS

110. The prosecution states that the complainant and the accused were in a defacto relationship since 2013 and they were living together at a rented flat in Lautoka. On 11th October, 2022 the complainant took out a domestic violence restraining order against the accused. The Magistrate's

Court at Lautoka granted interim non-molestation orders against the accused under section 27 of the Domestic Violence Act. One of the orders was for the accused not to physically assault or sexually abuse the complainant.

111. The interim DVRO was served on the accused on the 19th October, 2022 at the Magistrate's Court Registry by the Assistant Court Officer Osea Vuniyayawa, who had thoroughly explained the orders and the consequences of non-compliance.
112. The prosecution alleges that despite being aware of the orders the accused without reasonable excuse breached the interim DVRO when he physically assaulted and sexually abused the complainant. The allegations of assault and sexual abuse by the accused on the complainant happened between 5th of November, 2022 and 8th of November, 2022. The first allegation arose when the accused was seated in the car with the complainant.
113. The accused was sitting in the driver's seat and the complainant was seated in the front passenger seat. Whilst talking the accused leaned over the complainant went onto her chest and forcefully pushed upwards her top and bra. After this, the accused licked and/or sucked the complainant's breast. The complainant did not want the accused to do this to her and she did not like what the accused had done. The complainant did not consent for the accused to do what he had done.
114. Since it was early morning the accused told the complainant that they can discuss the issue of the car later in the flat since he wanted to sleep. The complainant trusted the accused so she allowed him inside the flat. When inside the flat the accused said he was hungry so the complainant went into the kitchen to prepare some food for the accused. At this time, the accused followed the complainant into the kitchen. In the kitchen the

accused removed his pants and he forcefully pushed the head of the complainant below his waist and penetrated his erected penis into the complainant's mouth.

115. After this, the accused held the arm of the complainant and took her into the bedroom where he pushed the complainant on the bed removed her clothes and forcefully penetrated her vagina with his penis. The complainant did not scream or shout in the kitchen and the bedroom because she did not want to wake her nephew Andrew who was sleeping in one of the room's and for her nephew to see her and the accused naked.
116. On all the above instances the complainant did not consent for the accused to do what he had done.
117. The complainant could not go and report the matter because the accused was in the house and she was scared of him. In the morning of 8th November there was an argument between the complainant and the accused. The accused pushed the complainant towards the grill door, in trying to control herself she injured her right index (pointer) finger by getting in contact with the protruding mesh wire in the grill door, and in the process she fell on the floor.
118. The injured finger of the complainant started to bleed, she left the flat and reported the matter at the Vitogo Police Post. The complainant was medically examined the same day she was taken by the police officers to the Punja's Health Centre where she was seen by a male doctor in respect of her finger injury. The doctor in his opinion stated that he saw laceration on the right index finger of the complainant. Thereafter the complainant was taken to Medical Services Pacific where she was seen by a female doctor. The doctor in her opinion stated that there was a forceful penetration of the complainant's vagina.

119. The prosecution finally submits that by committing the above offences the accused had breached the interim DVRO which prohibited the accused from physically assaulting or sexually abusing the complainant.
120. On the other hand, the defence says the allegations raised by the complainant are lies and a made up story. The defence is asking this court to look at the evidence objectively. The accused and the complainant are known to each other and they were in a steady relationship of about 9 years. The relationship was a progressive and a strong one that despite the accused paying for the purchase of the car he had no objection for the complainant to be a joint owner as well.
121. The defence submits that there is no shying away from the fact that the accused and the complainant were sexually active with each other and it is difficult to accept the rationale behind the allegations raised by the complainant. The intimacy started in the car where the complainant consented for the accused to suck her breast.
122. Furthermore, it was only after the complainant agreed that the accused went with the complainant into her flat. After shower when the accused was in the bedroom the complainant came from behind lowered herself and sucked the accused erected penis and then she lay on the bed and after the accused removed the complainant's clothes both had sexual intercourse which the complainant enjoyed. The accused was only able to do the above after the complainant had consented.
123. In respect of the allegation of assault the defence submits the accused cannot be blamed for this incident. The complainant due to her anxiousness to close the grill door (which was supposed to have been left open to allow the accused to get his wallet) got injured after the accused opened the grill door to go inside the house.

124. Finally, the defence would like this court to consider the fact that the interim DVRO issued by the Magistrate's Court was only in respect of non-molestation which did not stop the accused from going near the complainant. There has been no breach of the DVRO as alleged. The sexual allegations are baseless because it was consented by the complainant and there was no assault on the complainant by the accused the injuries seen on the right index finger was self-inflicted due to her carelessness and therefore the accused should not be blamed.
125. The defence contends this is a case of betrayal of trust by the complainant in that she consented but has now turned around to blame the accused. The chain of events expressed by the complainant does not make sense since at no time the accused did anything untoward to the complainant.
126. The accused was forthright and honest in what he told the court. The consent of the complainant is also implicit in her not shouting or screaming or doing anything to stop the accused, in other words she was cooperating in a manner that allowed the accused to have consensual sexual activities in the car and in the flat. The defence is asking this court not to believe the complainant.

DETERMINATION

127. At the outset, I would like to state that in the interest of justice I have disregarded the evidence of the accused about various sexual activities he had with the complainant which was beyond the scope of the cross examination of the complainant and the information filed.
128. 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.

129. In this case, there are two different versions, therefore 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.

130. 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).

131. 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.”

132. 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].

133. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a comprehensive and consistent account of what the accused had done to her. The complainant was also able to withstand vigorous cross examination and was not discredited as to the main version of her allegations.
134. The complainant was steadfast in what she had encountered and I have no doubt in my mind that she told the truth in court. Her demeanour was consistent with her honesty. It is also noteworthy that the complainant had promptly reported the matter to the police.

135. 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 did not scream or shout or wake her nephew or her landlord in the circumstances of this case does not mean that she was consenting to the forceful acts of the accused.
136. 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 like or agree to or approve of what the accused had done to her. The complainant was clear and coherent in her recollection of what had happened to her.
137. The defence vehemently argued that the visitation by the complainant at the remand centre and the cell block and taking with her food, fruits and toiletries for the accused on numerous occasions showed the complainant had feelings towards the accused and cared for him and therefore an indication of regret by her since she had consented to what the accused had done is far-fetched.
138. I accept that it was the accused who had asked the complainant for the items he wanted and the complainant had no choice but to visit the accused. On one occasion the visit by the complainant to the accused at the cell block was about the car which was co-owned by the accused. In my considered view the visitations cannot be construed as exonerating the accused from his conduct. The complainant made it known about what the accused had done and she had not consented.
139. The defence also says the complainant should not be believed because she told different versions to the two doctors about what had actually

happened. To Dr. Daunivalu the complainant had told her that there was oral penetration in the bedroom which is consistent with the accused evidence whereas she told the court the oral penetration had happened in the kitchen. This is not the end, the complainant also told this doctor that she was dragged into the living room when she had told the court that she went into the house on her own. To Dr. Kumar the complainant had said there was no sexual intercourse but in court she had said that there was sexual intercourse. The contradictions unfortunately do not favour the accused since he has agreed to the doing of the acts. The failure by the complainant to tell the doctors that the oral penetration happened in the kitchen or there was no sexual intercourse is irrelevant. In any event these contradictions are not significant to adversely affect the credibility of the complainant.

140. For counts one, two and three the issue is whether the complainant had consented for the accused to lick or suck her breast, oral and penile sexual intercourse. The definition of consent as mentioned in the early part of this judgment is crucial to resolve this issue. It is obvious to me from the evidence that the accused was forcefully doing what he wanted to do. The accused also knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

141. Furthermore, the defence contention that the complainant was not doing anything to scream or shout hence indicating consent is rejected by this court as untenable on the totality of the evidence. It is to be noted that the legal meaning of consent is wide which includes submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

142. The evidence of Dr. Daunivalu shows that there was forceful penetration of the vagina with laceration and abrasions in the internal genitalia supports the evidence of the complainant that there was forceful penetration of her vagina.
143. I also accept the evidence of the complainant that the accused had pushed her towards the grill door as a result her right hand index finger was injured. This is also supported by the medical report and the evidence of Dr. Kumar. The accused admitted that he was served with the interim DVRO and he was explained the contents by Osea Vuniyayawa. I accept the accused had no reasonable excuse to physically assault and sexually abuse the complainant. The interim DVRO was valid and binding on the accused which was breached by him when he committed counts one to four.
144. The inconsistency between the evidence of the complainant and her police statement brought up by the defence whether the accused had walked to where the complainant was sitting crunched down after opening the car door to apologize was not significant to adversely affect the credibility of the complainant's evidence in respect of count one sexual assault. I accept the explanation of the complainant that she had forgotten to mention in court about the minor aspects of what the accused had done to her when the car was parked in front of the house gate.
145. Moreover, despite vigorous cross examination the complainant was not shaken as to the basic version of her allegations. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (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;”

146. The defence brought about a motive on the part of the complainant by virtue of the fact that she was upset with the accused for telling her to start contributing towards household expenses since she was eating for free. Due to this comment by the accused which hurt the complainant badly in her frustration she concocted these false allegations. 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 a complainant to lie.

147. 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].’

148. 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. The accused did not tell the truth when he said the complainant had consented

for him to suck her breast and have oral and penile sexual intercourse and he had not pushed the complainant resulting in injuries to her index finger is unbelievable. The accused was changing his version of events as he went along his evidence and under cross examination by the state counsel the accused was not straight forward in his answers and at times showed anger. The accused demeanour was not consistent with his honesty.

149. This court accepts the evidence of all the prosecution witnesses as reliable and credible. On the other hand, this court rejects the defence of consent in respect of counts one, two and three and denial in counts four and five as untenable and implausible.
150. The defence has not been able to create a reasonable doubt in the prosecution case.

CONCLUSION

151. This court is satisfied beyond reasonable doubt that the accused between 5th and 6th November, 2022 had unlawfully and indecently assaulted the complainant by licking/sucking her breast. In respect of this 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. The acts of the accused have some elements of indecency that any right minded person would consider such conduct sexual and indecent in nature. Finally, the complainant did not consent to the above mentioned acts of the accused.
152. Furthermore, this court is also satisfied beyond reasonable doubt that the accused on the same date had penetrated the mouth and 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.

153. This court is also satisfied beyond reasonable doubt that the accused on 8th November, 2022 assaulted the complainant causing her actual bodily harm.

154. In respect of count five this court is satisfied beyond reasonable doubt that the accused between 5th November, 2022 and 8th November, 2022 after being bound by the interim DVRO number 374 of 2022 without reasonable excuse, contravened the said order by physically assaulting and sexually abusing the complainant.

155. In view of the above, I find the accused guilty of one count of sexual assault, two counts of rape, one count of assault causing actual bodily harm and one count of breach of domestic violence restraining order as charged and he is convicted accordingly.

156. This is the judgment of the court.


Sunil Sharma
Judge



At Lautoka

21 February, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.