

THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 07 of 2023

BETWEEN : **THE STATE**

AND : **SEFORANA TIPO MERASEU**

Counsel : Ms U Ratukalou for the State
Mr I Emasi for the Accused

Hearing : 18 & 19 March 2024

Closing addresses : 22 March 2024

Judgment : 26 March 2024

JUDGMENT

- [1] The complainant has been granted name suppression. Therefore, any public record of these proceedings must not contain any information that may lead to the identity of the complainant. She is referred to as 'DS' in this Judgment. I have deliberately avoided identifying details that may lead to identifying the complainant, such as the name of her mother or the name of her village.
- [2] The accused, Mr Seforana Tipu Meraseu, is charged with the following two counts:

Count 1

Statement of Offence

Sexual Assault – Contrary to Section 210(1)(a) of the Crimes Act 2009

SEFORANA TIPO MERASEU on the 27th day of December 2022, at Suva, in the Central Division, unlawfully and indecently assaulted **DS** by rubbing her vagina with his hand.

Count 2

Statement of Offence

Rape: Contrary to Section 207(1) & (2)(b) of the Crimes Act 2009

SEFORANA TIPO MERASEU on the 27th day of December 2022, at Suva, in the Central Division, penetrated the vagina of **DS** with his finger without her consent.

- [3] Mr Meraseu denies having committed the offences.
- [4] Mr Meraseu is alleged to have raped the complainant on 27 December 2022, by the use of his finger without the complainant's consent. Mr Meraseu is also alleged to have sexually assaulted the complainant on the same occasion by rubbing the complainant's vagina with his hand.

Count 1 – Sexual Assault

- [5] Sexual assault is an offence contrary to s 210(1)(a) and (2) of the Crimes Act.
- [6] To establish the offence of sexual assault, the prosecution must prove the following elements beyond a reasonable doubt:
1. On 27 December 2022, at Suva, in the Central Division, Mr Meraseu rubbed the complainant's vagina with his hand.
 2. The assault was unlawful and indecent.
 3. The assault was without the consent of the complainant.
 4. Mr Meraseu knew that the complainant was not consenting.
- [7] An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that causes the complainant fear or pain. 'Unlawful' means without lawful excuse. The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant's body or uses in a way which clearly

gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.

- [8] There is no suggestion in the present case that, if the accused touched the complainant as the prosecution allege, the touching was lawful.

Count 2 – Rape

- [9] The offence of rape has three elements: the penetration of a complainant's vagina, anus or mouth by the accused with their penis, finger or an object, the complainant not consenting to sexual penetration, and the knowledge of the accused that the complainant was not consenting.
- [10] Pursuant to s 207(2)(a) of the Crimes Act, the offence of rape occurs where a person has carnal knowledge of another person without that person's consent. Section 207(2)(b) provides that rape also occurs where a person penetrates another person's vulva or vagina with a thing or a part of the person's body that is not a penis without the other person's consent. The slightest penetration is sufficient to establish the element of penetration.
- [11] According to s 206 of the Crimes Act, the term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation, will not be considered as consent freely and voluntarily given. Consent or the absence of consent can be communicated by the words or acts of the complainant. The knowledge of the accused that the complainant did not consent is a matter for inference from all the proven facts.
- [12] To establish the offence of rape, the prosecution must prove the following elements beyond a reasonable doubt:
1. That on 27 December 2022, at Suva, in the Central Division, Mr Meraseu penetrated the vulva or vagina of the complainant using his finger.
 2. That the complainant did not freely and voluntarily consent to the penetration.
 3. That Mr Meraseu knew that the complainant was not consenting.

Burden of proof and assessment of the evidence

- [13] Mr Meraseu is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to Mr Meraseu. There is no obligation or burden on Mr Meraseu to prove his innocence. Mr Meraseu has a right to remain silent and no adverse inference can be drawn if he remains silent.
- [14] The burden is on the prosecution to prove the charges beyond a reasonable doubt. Each element of the charge must be proved but not every fact of the story. If there is a reasonable doubt, so that the Court is not sure of Mr Meraseu's guilt, or if there is any hesitation in my mind on any of the elements, Mr Meraseu must be found not guilty of the charges and, accordingly, acquitted.
- [15] Mr Meraseu chose to give evidence, but he does not carry any burden to prove or disprove anything. The burden remains on the prosecution to prove his guilt beyond a reasonable doubt.

Approach to the assessment of the evidence

- [16] I approach the evidence dispassionately, without sympathy or value-laden rules regarding how men and women should conduct themselves. It is entirely a matter for me to decide which witnesses are credible and reliable and which part of their evidence I accept as true.
- [17] If the account given by Mr Meraseu is or may be true, then he must be found not guilty. But even if the account given by him is entirely rejected, that would not relieve the prosecution of its burden of making sure by evidence of Mr Meraseu's guilt.
- [18] The prosecution's case is dependent upon the complainant's evidence. She is 15 years old. Her evidence does not require corroboration. If her account of the alleged incident is true, then Mr Meraseu is guilty of the charges. However, if her account is false or may be false then Mr Meraseu is not guilty.
- [19] The Defence case is of denial. The Defence submits that the allegation of sexual assault and rape is a fabrication. Mr Meraseu did not rub the complainant's vagina with his hand and did not penetrate her vagina with his finger as alleged by her.

[20] The identity of Mr Meraseu is not an issue in this case. If I am sure that Mr Meraseu committed the two acts, rubbing and penetrating of the complainant's vagina with his hand and finger respectively, then consent is also not an issue. The complainant did not consent to these acts and Mr Meraseu would have known that this was the case. My determination of Mr Meraseu's guilt will turn on whether I accept that the prosecution has proven beyond a reasonable doubt that Mr Meraseu committed the two alleged acts on the complainant.

Evidence

[21] The Admitted Facts are:

- i. The identity of the complainant, her mother and the accused are admitted as is the fact that the complainant was 14 years old in December 2022 when the events in question are said to have occurred. Her birth certificate has been produced with the Admitted Facts.¹ Mr Meraseu was aged 52 years at that time.
- ii. It is also admitted that the accused was the complainant's stepfather at that time and DS referred to him as 'Ta', which in Itaukei means 'dad' or 'father'.
- iii. Also admitted is that in December 2022 the complainant, her mother and the accused resided at Duvula Road, Nadera, Suva, at the accused's family home. The house has three bedrooms.

Prosecution Case

[22] The State called two witnesses being the complainant and her mother. The State made several applications in respect to DS' evidence; namely, that the evidence be provided in closed court, a screen to be placed between DS and the accused so that DS could not see the accused, and the presence of DS' Aunty as a support person while DS gave evidence. The accused did not object. The orders were granted given the nature of the alleged offences and the age of the complainant.

[23] The complainant's evidence in examination-in-chief was as follows:

- i. In 2022, DS was in year 9 at school. She lived in her mother's village in Tailevu. She stayed with her grandfather in his house along with her younger sister.

¹ The complainant was born in July 2008. She is now aged 15 years.

- ii. DS' mother was in a relationship that year with the accused and they lived in Nadera, Suva at the accused's house. DS's younger brother stayed with their mother and the accused at Nadera.
- iii. Before her 14th birthday in July 2022, DS' mother and the accused came to visit DS in the village and stayed a short time at her grandfather's house. This is the first occasion that DS met the accused. At some point in time after her 14th birthday the accused would visit every weekend. Sometimes he came with DS' mother, other times he came alone. He would stay at DS' grandfather's house each time.
- iv. DS's mother told the complainant that she should call the accused 'Ta'. The complainant described her relationship with the accused at that time as good and that she felt safe with him in the house. In explanation for her answer that the relationship was good she stated that the accused loved them all equally, meaning she and her siblings, and that when he bought things for them he shared it equally.
- v. Before the end of 2022, the complainant's mother decided that the complainant would come to Nadera so that she could buy DS' school stationary. In December 2022, the complainant travelled from the village by bus to Nadera to stay at the accused's house so that her mother could organise the purchase of the school stationary. This was the first time that DS visited or stayed at the house. DS' mother, her younger brother and the accused were at the house. After the stationary was purchased, DS stayed on at the house for several more days, including Christmas Day.
- vi. DS was asked to describe in detail the accused's house and the occupants. The house is two storeys and has three bedrooms. Upstairs there are two bedrooms, a washroom and a living room. Downstairs there is one bedroom and a kitchen. There are three families in the house and each family occupy a bedroom. The accused, DS's mother, DS and her younger brother shared a bedroom upstairs. Belinda, Elijah and their 3 children occupied the bedroom downstairs. Johnny, his wife and their 3 children occupied the bedroom upstairs.
- vii. Upstairs, there is a passageway leading from the living room to the two bedrooms and washroom. Each room has its own wooden door. The upstairs was reasonably well lit with tube lights in the washroom and passageway although there was no

light in their own bedroom. There was a TV and table in the sitting room upstairs. Everybody ate their meals downstairs.

- viii. Inside the accused's bedroom was a king size bed situated next to the wall with a two-louvre window. The only other furniture in the room was a wardrobe. DS' evidence was that the accused slept on the floor while she, her mother and her younger brother would sleep on the bed. Sometimes her mother would sleep on the floor with the accused.
- ix. On the evening of 27 December 2022, the complainant and her younger brother had dinner and then went upstairs to watch TV in the sitting room with the other children. DS' mother and the accused had dinner whilst the children were watching TV. DS fell asleep whilst watching TV but awoke sometime later, she thinks it was around midnight. She saw that Belinda and her family were all asleep on the floor. The TV and passageway light were still on. DS decided to go to bed and made her way to the bedroom.
- x. As DS entered the bedroom she was able to see, from the light in the passageway, that her mother and the accused were sleeping on the floor. The accused was lying closest to the bed. DS' brother was sleeping on the bed next to the wall by the window. DS got on the bed, positioned herself next to her brother, nearer the edge of the bed and went to sleep. When she went to sleep she was wearing shorts and a shirt along with underwear and a bra.
- xi. At some point in time thereafter DS felt her bra being untied but thought nothing of it. She then felt a hand touching her shorts and then rubbing her vagina. She then felt somebody poke her 'hole' with their finger. She clarified that her hole was her vagina, ie where babies come from. She described the poke as painful. The pain caused her to immediately open her eyes. As she did so, she felt the hand being withdrawn from her body and saw the accused sitting on the floor facing towards her. DS states that the accused said sorry to her and then stood up and left the room. She said the door was open and she could see him go to the washroom. DS was asked how she felt when the assaults were happening to her and why she didn't do anything to stop it. DS stated that she was afraid.

- xii. When the accused told her he was sorry, DS began to cry. DS stated that when she sat up and saw the accused she *'was scared and I was thinking that I shouldn't have come to my mum but I should have stayed at home with my grandfather'*.
- xiii. After the accused left the room, DS woke her mother and told her what the accused had done to her. DS's mother was crying and angry and she asked DS for forgiveness. When the accused returned from the bathroom DS's mother punched the accused. DS says that she and her mother then left the bedroom and went downstairs. DS's mother informed Belinda what had happened. Mother and daughter then left the house to report the matter to the Valelevu Police Station. The same day the complainant was medically examined by a doctor.
- xiv. DS explained the impact of the events on her. She stated that it has affected her schoolwork.

[24] In cross examination, it was put to DS that there was another, fourth, family staying in the house, being the accused's brother Paul, along with Kia, Tia and their two children; that this family were staying in the room downstairs and that Belinda's family were, in fact, staying in the sitting room upstairs. DS disagreed stating that *'all I know that that room [downstairs] is occupied by Belinda'*. Nevertheless, she accepted that even with three families the house was overcrowded.

[25] Questions were put to DS regarding her relationship with the accused. It was put to her that the relationship since the beginning had been difficult and that she refused to do chores when asked by the accused and he had in turn responded with harsh words to her. She denied this. It was also put to DS that on the day of the alleged offence, the accused had asked her to wash their clothes, she didn't do so and this led to an argument between them. Again, she denied this. It was further put to the accused that their difficult relationship had in turn led to arguments between the accused and DS' mother. DS denied this as well.

[26] DS was asked about the written statement that she had made to the police. In the police statement she stated that she woke up and found that she was naked and the accused then rubbed her vagina and poked his finger into her vagina. In her evidence in court DS had stated that when she woke up she still had her clothes on when the accused committed the acts. She stated that her statement to the police was the correct version of events.

- [27] DS was asked why she didn't call for help when the alleged events were happening as the house was full. She replied that *'I was scared. And I couldn't believe that that thing would happen to me.'* Finally, it was put to DS that she made up these allegations as she didn't like the accused being with her mother. She denied this.
- [28] In re-examination, DS was asked why she stated in court that her clothes were still on, contrary to what she said in her police statement. DS stated that she did so because she felt embarrassed. She was ashamed to say that she wasn't wearing anything. DS did a dock ID of the accused, identifying him as her stepfather and the person who had committed the alleged offences.
- [29] The second prosecution witness was DS' mother. She stated:
- i. She was staying in the village up until 2022 when she began her relationship with the accused. At some point in 2022 she went to live with the accused in Nadera at his family home and took her younger son.
 - ii. She stated that the accused and DS had a good relationship.
 - iii. On the evening of 27 December, she had her dinner and then at about 8pm went to the bedroom to sleep. Her children were watching TV at the time. About 5 minutes after she went to bed, her son came in and lay down on the bed. After that the accused came to the bedroom and slept on the floor.
 - iv. She was woken later in the night by her daughter who was crying and told her what the accused had done to her. DS told her that the accused pulled up her shirt and touched her breast and took off her shorts and underwear and inserted his hands into her vagina. The Itaukei words used by DS to her mother were *'sena i loma'* meaning inside the vagina. DS' mother was angry as well as crying. When the accused returned from the washroom and was confronted he said he didn't intend to do those things. DS' mother punched the accused in the face. She and DS then left the bedroom and went to speak to Belinda. DS' mother informed Belinda what had happened and then left the house with DS to make the report to the police.
- [30] In cross-examination by the Defence, the complainant's mother rejected the suggestion that DS and the accused had a difficult relationship. She said they were in a *'good'*

relationship, that DS always did what she has been told to do, and that most of the time they didn't talk to each other.

- [31] DS' mother was directed to her police statement wherein she stated that when she first heard these allegations from DS *'would you agree that you could not believe the allegations your daughter was saying to you?'* DS' mother agreed stating *'Yes I could not believe it'*.
- [32] It was put to DS' mother that when the accused was confronted he did not say that he did not intend to do the things and the accused instead said *'why would I do such a thing in full house and then he told you if you want to go then go'*. DS' mother denied this saying it was a lie.
- [33] DS's mother was not asked about the fourth family in the house (ie Paul, Tia and Kia and the children). Nor was she asked whether she and the accused were also having relationship problems.
- [34] Re-examination was brief. DS' mother again confirmed that DS and the accused had a good relationship. She explained that DS and the accused hardly talked to each other and would mostly communicate to each other through her.
- [35] The State then closed its case. I informed the accused that the State had produced evidence for each of the elements for the two counts and, as such, I was satisfied that there was a case for the accused to answer. I put the three options to Mr Meraseu and following consultation with his counsel, Mr Meraseu decided to provide sworn evidence.

Accused's Case

- [36] Mr Meraseu provided the following evidence in examination in chief:
- i. In 2022, he lived at his family house at Nadera. There were four families in the house. In addition to the three families identified by DS, there was also his brother, Paul, Litiana and Isikia and their two children. They stayed in the bedroom downstairs. Belinda and her family stayed in the upstairs sitting room.
 - ii. The accused accepted much of what was laid out by DS and her mother. For example, DS' mother and younger brother had started living with the accused in

Nadera in 2022 and that he had regularly visited the village, staying at DS' grandfather's house on weekends. The accused did farming at the village. The accused also stated that during that time his relationship with DS was not good. He stated:

At times we don't get on well, she normally speaks to me in a bad language and says all sorts of things that is disrespectful to me. And sometimes we have arguments that we don't speak to each other because of her ways and the things that she says to me that she doesn't respect me at all.

- iii. The complainant came to stay at the house in Nadera on 15 December 2022. The school stationary was purchased before Christmas.
- iv. The accused was asked about the events on 27 December 2022. He stated that he woke up at 5am and went to the backyard to farm. When he got back to the house, he asked DS to do some clothes washing. Then at about 10am the accused went to his sister's house. He returned around mid-day and saw that the clothes had not been washed. The accused states:

When I returned home the clothes wasn't washed and then I told her [DS] why didn't you wash the clothes and she started mumbling and telling me in Itaukei language that I am not her dad and why should she listen to me and I have nothing to do with her and she was mumbling and saying things and I knew that she was angry with me also because I gave her the chores and I told her if you don't do the chores then you can return back to your grandad in the village to stay with him there and maybe better for you to be in the village then to be with me in Suva and your mother and I left her and I went upstairs.

- v. The accused further described their relationship in the following terms:

I would say that our relationship is not good at all because we don't talk to each other and most of the things that I advise her she doesn't do it and every time I say things to try to encourage her she doesn't listen and she gives mumbles and gives me bad words that is very disrespectful to me.

- vi. The accused described the events that evening as follows:

On that day I was at home, the evening, the kids had dinner first, then I had dinner. After that then we went upstairs for a while then I went to a friend's place. I returned at 1 o'clock in the night, came and went to the room and then I went into the toilet and after I got into the toilet when I came out and when I lay down [DS' mother] started kicking and punching me and I try to ask her what happened and I was like shocked that she started blaming me about the incident. Then I told her how I would will do these things when there is a lot of people in the house. And I feel like that something was wrong that they must have talked about because me and [DS' mother] too was having difficulties and arguments through the day and she has been saying that girls are calling me and messaging me and we were not in good terms that day with [DS' mother] and [DS].

- vii. The accused stated that his nephew Johnny opened the door for him when he returned home at 1am. The accused was asked further about the confrontation with DS' mother when he returned from the washroom. He stated:

And then she start saying why did you do this and why did you do this and I asked her what did I do and she said that [DS] said you did something so I told her how can I do that when there is a lot of people in the house and why you trying to blame me for doing such things that I didn't do. Are you trying to frame me and then she stated swearing and saying unuseful things and I didn't understand the reason why she keep on punching me when there was nothing wrong.

- [37] In cross examination, Mr Meraseu stated:

- i. He provided more information about the family house. It was previously owned by the accused's parents who had passed away and left the house to the accused and his younger brother. The accused was effectively the owner of the house. He had lived there for about 30 years. All the occupants were his family members.

- ii. The accused was referred to his caution interview with the police where he was asked who was staying at the house. He identified everybody except Paul, Litiana, Isikeli and their children. He accepted that the first occasion he had mentioned them staying in the house was in court that day.
- iii. There were then questions about the events on the night of 27 December 2022. The transcript of his answers reads:

Ms Ratukalou: *So that night Belinda and Johnny were sleeping with the children in the living room?*

Mr Meraseu: *Yes*

Ms Ratukalou: *And only children, their children was sleeping with them in the sitting room?*

Mr Meraseu: *Yes*

Ms Ratukalou: *So you [DS' mother], [DS] and [DS' brother] were in the room?*

Mr Meraseu: *Yes*

Ms Ratukalou: *And [DS' brother] was sitting beside the window?*

Mr Meraseu: *Yes*

Ms Ratukalou: *And [DS] was sleeping beside him?*

Mr Meraseu: *Yes*

Ms Ratukalou: *And [DS' mother] was sleeping beside the wardrobe*

Mr Meraseu: *Yes*

Ms Ratukalou: *So when you were sleeping that night after that at one point between midnight and early in the morning you had then gone to the toilet*

Mr Meraseu: *Yes*

Ms Ratukalou: *So you were sleeping then you went to the toilet*

Mr Meraseu: *Yes*

- Ms Ratukalou:* *As soon as you came back to the room that is when [DS' mother] began punching you?*
- Mr Meraseu:* *Yes*
- Ms Ratukalou:* *And then you told her and you said why would do such a thing in a full house*
- Mr Meraseu:* *Yes*
- Ms Ratukalou:* *You don't know what [DS] had told her mum?*
- Mr Meraseu:* *No*
- Ms Ratukalou:* *You were not in the room?*
- Mr Meraseu:* *No*
- Ms Ratukalou:* *So when you came back [DS' mother] just straight away start punching you?*
- Mr Meraseu:* *Yes*
- Ms Ratukalou:* *And when she had punched you she hadn't said anything to you then she was just angry and crying?*
- Mr Meraseu:* *Yes, she was saying that I did something to the daughter*
- Ms Ratukalou:* *When you came back you saw that she was angry and she was crying?*
- Mr Meraseu:* *I didn't see her crying*
- Ms Ratukalou:* *She was angry?*
- Mr Meraseu:* *Yeah she was just standing up and start punching me and kicking me*

Analysis of the Evidence

- [38] In December 2022, DS' mother began a relationship with the accused and moved from the village into the accused's house in Nadera, Suva, with DS' younger brother. DS remained in the village staying with her maternal grandfather. In the months leading up to December 2022, the accused spent most weekends visiting the village and stayed at

DS's grandfather's house. DS describes her relationship with the accused over this period as good while the accused paints an unhappy picture of a surly argumentative teenager who did not take to the accused. DS came to stay at the Nadera house for a short while in December 2022. This was her first visit. The purpose was for her mother to organise the purchase of her school stationary. According to the accused, DS arrived on 15 December so had been in the house for almost two weeks when the events in question are alleged to have occurred. She was aged 14 years at this time.

[39] Another point of dispute is whether there were three or four families staying in the house at that time. The accused says there was four, the additional family being the accused's brother Paul, along with Litiana and Isikia and their children. DS denies this. Her mother was not asked about the matter. There is no dispute that even with three families the house was full.

[40] DS described 27 December 2022 as being largely uneventful, that is until the late hours of that night. DS fell asleep in front of the TV and made her way to the bedroom at about midnight. Her mother and stepfather were sleeping on the floor. She got on the bed and slept next to her younger brother. She was subsequently woken from her sleep when she felt a hand on her body. Her eyes remained closed but she felt the hand moving over her groin area, first rubbing the outside of her vagina and then a finger poke inside her vagina. The poking of her vagina caused her pain and she opened her eyes to find the accused sitting facing her. He apologised to her and then went to the washroom.

[41] DS immediately told her mother what the accused had done. Her mother reacted with anger and when the accused returned to the bedroom she punched the accused. The accused denies having committed the assaults on DS. There is also a dispute over what he said to DS' mother when confronted with the allegations. DS' mother states that he said to her *'that he didn't mean to do those things, he didn't intend to do that'*. The accused states that he said *'how can I do that when there is a lot of people in the house and why you trying to blame me for doing such things that I didn't do. Are you trying to frame me'*. The accused says his relationship with DS' mother had not been good at this time. DS' mother was not asked about this.

[42] We are left then with the main dispute being whether the accused committed these assaults to DS' body on the evening in question. DS says that the accused rubbed her vagina and poked his finger into the inside of her vagina while she was lying on the

bed. The accused denies this. No other person was awake in the room and no other person in the house was witness to the alleged acts.

Determination

- [43] Once again, I remind myself that the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. There are two conflicting versions provided by the State and the Defence. Even if I reject the Defence's version, the State must still prove its case beyond a reasonable doubt.
- [44] I keep 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, and the demeanour and deportment in court - see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qural* (HC Criminal - HAC 14 of 2022)).
- [45] In *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 Brennan J 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".

- [46] I also take into account the observations made by the Court of Appeal in *Rokocika v The State* [2023] FJCA 251; AU0040.2019 (29 November 2023):

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].

Evidence of complainant and her mother

- [47] I found the complainant to be honest and straight forward. She exhibited the usual shyness of a teenager. She was visibly embarrassed by having to talk about private matters of a sexual nature. She was visibly emotional when talking about the assaults to her body, crying when retelling these events. At times she was thoughtful about the answers, for example when describing the lay out of the interior of the house. She was not afraid to say when she was unsure, couldn't recall or did not know the answer to a question. She did not become defensive in response to confronting questions from the Defence that contradicted her version.
- [48] If I accept DS' evidence as correct then the accused committed the two offences as charged. The complainant says that the accused rubbed her vagina with his hand and poked inside her vagina with his finger. Any penetration suffices for rape. DS did not consent to the acts and the fact she did not resist or call for help is not to be taken as consent. If the accused did these acts then he will have been aware that DS did not consent. If, as DS states, the accused apologised to DS when she opened her eyes this is consistent with the accused understanding that DS did not consent. The Defence question what the accused was sorry for and is critical that DS was not asked to explain this. The word of apology was said to be the accused's word, not DS' word and, as such, DS would not have known the answer to that question. However, in my view it can be inferred from the surrounding facts that there can be only one logical explanation for the apology being the accused's assault on DS' body.

[49] During DS' examination in chief, a question arose whether DS was asleep when the rubbing of the vagina occurred. At one stage, as State counsel endeavoured to clarify the matter, DS responded that her mind was asleep. I have re-read the transcript carefully in respect to this evidence. DS's initial account of the assaults was straightforward. Her words were clear. She was awake when the events occurred but her eyes were closed. She was understandably afraid to open her eyes or call for help. She was only 14 years old. She only opened her eyes when the finger poked inside her vagina caused her pain. It is helpful to set out this evidence:

Ms Ratukalou: So you told us that you slept. Now while you were sleeping can you tell us what had happened next? When did you next wake up?

Clerk: While I was sleeping I could feel that my bra was untied and I didn't care about it so I just went back to sleep and I could feel that a hand was touching my trousers and he was touching my vagina. Then I could feel that he was poking me.

Ms Ratukalou: So you said you felt a hand touching your trousers, so when you say you felt it, the hand touching your trousers, in what way was it touching your trousers, can you explain what do you mean by touching?

Clerk: Inside

Ms Ratukalou: So you had told us that you were wearing a panty and then your shorts

DS: Yes

Ms Ratukalou: So you could feel his hand underneath your shorts and above your panty, or was it, can you explain what you mean when you say inside your shorts, because you told us you were wearing a panty as well

Clerk: He was touching inside

- Ms Ratukalou: When you say he was touching inside, what part of your body was he touching?*
- DS: My vagina*
- Ms Ratukalou: And so this is a hand right, can you remember which part of the hand was touching your vagina, was it all of the hand or was it a certain part of his hand that was touching your vagina? What part of the hand did you feel touching your vagina, was it all of it or was it a certain part?*
- DS: Only some of his hands*
- Ms Ratukalou: When you say some of his hands, do you mean this part or some of his hands meaning his finger or his palm?*
- DS: His fingers*
- Ms Ratukalou: And when you say touch, say for example the fingers, can you explain when you say touch, in what way was he touching your vagina?*
- DS: [witness demonstrated to the court]*
- Ms Ratukalou: Can you just show us how he moved his hand?*
- DS: [witness demonstrated to court - rubbing motion with fingers]*
- Ms Ratukalou: And how long did he rub that part of your body for?*
- DS: Short time*
- Ms Ratukalou: You told us that you were wearing a panty, so you were wearing a shorts, panty so when he put his hand inside was his hand on top of your panty or underneath the panty*
- DS: Underneath the panty*

- Ms Ratukalou:* *So it was your shorts, panty and his hands and your body part?*
- DS:* *Yes*
- Ms Ratukalou:* *You told us when you were explaining it you said he, who were you referring to when you say he?*
- DS:* *Seforano*
- Ms Ratukalou:* *Now you had told us that you had initially woken up to the feeling of bra strap being untied and then you went back to sleep and later you said you could feel the hand right, now when you could feel the hand touching your trousers and the hand touching your body part that you explain to us were your eyes open or closed at that time?*
- DS:* *It was closed*
- Ms Ratukalou:* *So at that time that this person was touching your vagina your eyes was still closed?*
- DS:* *Yes*
- Ms Ratukalou:* *So then you said that you could feel after he touched that part of your body, then you could feel that he poked your hole?*
- DS:* *Yes*
- Ms Ratukalou:* *Now when you say poked, what did he use to poke that part of your body?*
- DS:* *His hand*
- Ms Ratukalou:* *Now when you say his hand, this is all the hand, so which part of the hand, palm or the fingers, which part did you feel had poked that part of your body?*
- DS:* *Point finger*
- Ms Ratukalou:* *Can you indicate which finger would that be?*
- DS:* *[witness demonstrated in court which finger]*

Ms Ratukalou: You said that he had poked, you use the words hole, which part of your body are you referring to? Which part you say that he rubbed, was it this front part or was it towards the part underneath near the entrance where the baby comes out

DS: The front part

Ms Ratukalou: When you say that he poked your hole which part are you referring to, the front part of down here where the opening is?

DS: Where the opening is

Ms Ratukalou: Where baby usually come out, that opening?

DS: Yes

Ms Ratukalou: When you say that he poked it, he used his finger would you know how far inside you felt that the finger went?

DS: No

Ms Ratukalou: When he poked that part of your body what did you feel, what could you physically feel?

DS: It was paining

Ms Ratukalou: Which part was paining, the front or where the opening is?

DS: Where the opening is

Ms Ratukalou: From what you felt do you know if his finger went inside that opening or not?

DS: Yes

Ms Ratukalou: And when he put his finger he poked it and it went inside what did he do with the hand, with the rest of his hand, did he make any motion with his hand or did he just keep it still?

DS: No

Ms Ratukalou: So he kept it still?

DS: Yes

Ms Ratukalou: Can you remember how long he had poked that part of your body?

DS: Short time

[50] The confusion about whether DS' eyes were simply closed or she was asleep arose after the above evidence. It is clear to me that DS did not understand the questions or the distinction being drawn by the prosecutor. Indeed, there were occasions when DS became confused by questions from both counsel. The questions from the State about what she meant by her eyes being closed caused such confusion as did questions from the Defence about her relationship with the accused being 'rocky' or the two not seeing 'eye to eye'. Her confusion with these questions can be explained by her age but also by the fact that her first language is Itaukei, not English. Importantly in my view, however, with respect to whether she was asleep when the alleged sexual assault occurred, each time DS made it clear that she felt a hand. This is consistent with her eyes being closed only.

[51] Both DS and the accused have come under scrutiny by the Defence and the State respectively for their statements to the police. Certain parts of the written statements to the police are inconsistent with the evidence each have provided to the Court. This Court is permitted to take into consideration the inconsistencies between what the witnesses told the court and their statements to the police to consider whether the witnesses are believable and credible. It is obvious that the passage of time can affect one's accuracy of memory. It cannot be expected that every detail will be the same from one account to the next. If there is an inconsistency, it is necessary to decide, firstly, whether the inconsistency is significant and, secondly, whether the inconsistency 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. If there is an acceptable explanation for the change, then this Court may conclude that the underlying reliability of the witness' evidence is unaffected. If the inconsistency is fundamental, then it is for this Court to decide to what extent it influences the reliability of the witness' evidence. As the Court of Appeal observed in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) at [16]:

[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;

- [52] In cross-examination, DS accepted that her evidence in court was inconsistent with the police statement she had previously signed. Her evidence was inconsistent with the police statement in one respect. She stated to the police that she was naked when she woke up and that the assault occurred after this. In court, DS stated that she was clothed when she woke up and the assault occurred while she was clothed. DS accepted that the correct version was that contained in the police statement. Her explanation for not providing the correct account was that she was embarrassed and ashamed to say in court that she had been naked. I accept this explanation. It is consistent with DS' demeanour when she gave evidence. As I have stated, DS was visibly embarrassed when she was giving evidence on the intimate aspects of the case. Her explanation for the inconsistency is entirely in keeping with what I saw of DS in court.
- [53] DS was asked why she did not stop the accused from committing the acts or call for help. Given the proximity of her mother and the number of people in the house, assistance was very close. DS stated that she was scared. Again, I accept this explanation. Each person will react in their own way to danger and fear. DS was a 14 year old, away from her usual safe environment in the village at her grandfather's house. The fact that she kept her eyes closed during the assault is consistent with that fear.
- [54] Similarly, I found the complainant's mother to also be clear and straightforward. She spoke quickly but clearly. She was not searching for the right answer but providing a

recollection of events as she remembered them to be. There was no evidence of fabrication either in her demeanour or in the words that she used.

- [55] The importance of her evidence pertains to the recent complaint rule – she was the first person that DS complained to about the accused’s conduct. This evidence does not corroborate DS’s evidence but the consistency of the timing of the complaint lends weight to DS’ credibility. As the Court of Appeal noted in *Kumar v State* [2018] FJCA 65:

[9] It was the evidence of PW2, Madhur Lata who gave evidence relating to recent complaint. Regarding recent complaint the Respondent referred to the decision in Senikarawa v. State [2006] FJCA 25; AAU0005.2004S (24 March 2006) where it was stated:

[14] Evidence of recent complaint may be adduced to show the consistency of the conduct of the complainant and to negative consent. Kory White v. R [1999] AC 210 requires that both the complainant and the named person to whom the complaint was made must testify as to the terms of the complaint. If the evidence of recent complaint is admitted then the jury should be directed that such complaint is not evidence of the facts complained of and cannot be regarded as corroboration, but goes to the consistency of the conduct of the complainant with her evidence given at the trial.

[15] The principle on which the evidence is admitted is to support and enhance the credibility of the complainant. The jury, in assessing the truth of the complainant’s evidence, may take into account evidence as to the consistency between that evidence and evidence of her contemporaneous complaint. It can be aid to her credit (Spooner v. R [2004] EWCA Crim. 1320, Eng. Court of Appeal,

[10] In State v. Likunitoga [2018] FJCA 18; AAU0019.2014 (8 March 2018), the Court of Appeal stated:

[56] *The legal position on recent complaint evidence was stated in **Raj v. State** CAV0003 of 2014: 20 August 2014] FJSC 12*

*In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App.12 of 1989; *Jones v The Queen* [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S, 24th November 2006.*

*Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint. **Kory White v. The Queen** [1999] 1 AC 210 at p215H.K."*

The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[11] *In **Anand Abhay Raj v. State** [2104] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court referring to recent complaint stated:*

[38] The complaint is not evidence of facts complained of, nor is corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

- [56] It is for this Court to decide whether the evidence of recent complaint assists 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. Here the complaint was reported immediately by DS to her mother. DS was also crying which is further consistent with DS' account.
- [57] The second important aspect of DS' mother's evidence is her account of the accused's response when confronted. She stated that the accused said he did not intend to do 'it'. I infer 'it' to mean the offending on DS. This is evidence that the accused admitted to having done something wrong. The accused disputed the fact that he said the words. He says that he instead said why would he do such a thing in a full house. The accused says that DS has manufactured the story because of their difficult relationship. He claims that DS' mother has similarly lied about the statement because they too were having problems. The accused's evidence here has an air of convenience. Neither DS nor her mother accepted that DS and the accused had a difficult relationship. If there was a difficult relationship this is inconsistent with the accused agreeing to DS coming and staying at the house for two weeks in December. Also, such a fractious relationship would have been observed or noted by others in the crowded Nadera house and yet the accused called no witnesses to support his evidence on this matter. In any event, I accept the evidence from DS and her mother that DS and the accused had a good relationship up to the time the alleged offending occurred. DS and her mother appeared genuinely surprised by these questions in cross-examination. As for the accused's evidence that he had had problems with DS' mother around that time, this was not put to DS' mother.
- [58] There were, as the Defence pointed out, discrepancies between DS's evidence and her mother's evidence. For example, her mother stated that DS told her that the accused had removed her shirt and touched her breast. DS did not state that this happened in court. There was also a discrepancy as to whether the bedroom door was open or closed when the accused left to the washroom after the alleged offending. Also, DS says that she did not hear the accused say anything after he returned from the washroom, contrary to DS' mother. However, even the accused accepts he spoke, albeit using different words. In my view, these discrepancies do not shake the core allegations by DS. I would, in any event, expect there to be some differences between their evidence whether as a result of DS' inaccurate reporting or her mother's inaccurate recollection.

Both had been asleep immediately before the events occurred. The events were traumatic for both of them in different ways.

- [59] The Defence also suggest that certain parts of DS' mothers evidence undermines the prosecution case. For example, her mother said that DS and the accused did not talk to each other and spoke through DS' mother. The Defence suggests that this shows that DS and the accused were not on good terms. I do not read her evidence the same way. DS and the accused were not familiar with each other. DS' mother was an obvious person to channel their communications. Indeed, DS' mother made this remark in her re-examination after having expressly reiterated that the relationship was good. The Defence further says that DS' mother stated that she did not believe it when DS told her what the accused had done. In my view, the Defence has misconstrued DS' mother's statement. DS' mother was simply expressing her shock at the news, and not expressing her opinion about the truth of it. Indeed, DS' mother's angry reaction to the news, punching the accused, demonstrates that she believed her daughter.

Accused's Evidence

- [60] The accused denies sexually assaulting and raping DS. He says the acts did not occur. He did not say sorry to DS or make any admission to DS' mother. He says they both made up these serious lies against him because of a difficult relationship he had with each; the difficult relationship always existing with DS and the difficulty with the mother being more recent to the events on 27 December 2022.
- [61] The Defence raised a motive on the part of the complainant, being that DS was upset with the accused for telling her to do household chores and that DS was not happy about her mother being in a relationship with the accused. I have directed my mind to the Jovanovic direction to remind myself that an accused has no burden to prove a motive or prove a reason for a complainant to lie. The Court of Appeal in *Rokocika's* case (supra) from 32 to 34 stated:

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].

[62] As I have stated, I found the accused's evidence regarding the difficult relationships with DS and her mother to be convenient. It also inconsistent with the undisputed facts. Why agree to DS coming to stay at his house for two weeks if he had a problematic relationship with the teenager and matters with her mother were also poor. In a crowded house the accused could not avoid DS and certainly not at night when all four were sleeping in the same bedroom. It would not have gone unnoticed in the full house if

his relationship(s) with DS and her mother were bad. One of the accused's family members would have noticed this. Arguments and harsh words would have been heard. Yet, the accused called none of his family to provide evidence to corroborate his evidence on this.

- [63] Similarly, I do not accept the accused's evidence that a fourth family were staying in the house, being the accused's brother Paul, along with Litiana, Isikia and their children. This evidence was plainly important to the accused. He challenged DS about this and sought in his own evidence to elevate the numbers in the house to support his assertion that it is inconceivable that he would commit an offence in light of the high likelihood of being seen or caught by others. I found this assertion to be unconvincing and somewhat contrived. Contrived in that the accused sought to make out that the numbers in the house were more than there actually were. I do not accept that Paul, Litiana, Isikia and their children were residing in the house at the time DS stayed there in December 2022. I say this for these reasons, and in no particular order: DS denied this, the accused's account was inconsistent with the information he provided to the police in his caution interview, DS' mother was not asked about the matter, and the accused did not call his brother or Litiana or Isikia to corroborate his evidence on this. While such evidence does not go to the fact of whether the accused committed the offences it does go to the accused's credibility.
- [64] In terms of the assertion that the accused would not commit such an offence in an overcrowded house, I disagree. If the accused is prepared to commit the offence in a small bedroom with DS' mother and brother in very close proximity it would not deter the accused that there are 15 other persons in the house. Further, the assertion ignores the fact that the alleged offending occurred in the early hours of the morning when everyone, including DS' mother and her brother, were asleep.
- [65] In summary, I do not accept the accused's evidence as being truthful or reliable. I do not accept that his relationship with DS was bad. I do not accept that Paul and his family were staying at the house at the same time as DS.
- [66] Although I reject the accused's evidence as being untrue, I remind myself that the State still carries the burden of proving that the offences were committed by the accused. I am satisfied beyond a reasonable doubt that the State has done so. I am sure that DS and her mother were both honest and truthful witnesses and that the accused rubbed

DS' vagina with his hand as well as penetrated the inside of DS' vagina with his finger at the time in question.

Conclusion

- [67] As stated, although I do not accept the accused's evidence, that does not mean that the accused is guilty. The prosecution is not relieved of its burden to prove beyond a reasonable doubt that offences were committed by the accused. Having listened to all the evidence carefully I am sure that DS' evidence correctly sets out what happened to her that night. Her complaint to her mother is consistent with DS' evidence. The accused's response to DS' mother, that he did not intend to do it, indicates to me that his offending was impulsive and not planned.
- [68] I accept the evidence of the complainant as truthful and reliable. She gave a clear account of what the accused had done to her. The complainant was not discredited as to the core version of her allegations. I have no doubt in my mind that she told the truth. Her demeanour was consistent with her honesty. The fact that DS did not yell or wake her mother when the offending was occurring does not mean that the offending did not occur or that she was consenting to the acts of the accused.
- [69] I do not accept the accused's evidence. He asserts that DS and her mother have concocted a story with very serious consequences because of his poor relationship with both yet has not called any occupants of the house, all of whom are his family members, to corroborate any aspect of his evidence.
- [70] The Court is satisfied beyond a reasonable doubt that the accused on 27 December 2022 unlawfully and indecently assaulted DS rubbing her vagina with his hand. The act has some element of indecency in that any right-minded person would consider such conduct sexual and indecent in nature. DS did not consent to the act of the accused and the accused would have been aware that DS did not consent.
- [71] The Court is also satisfied beyond a reasonable doubt that the accused on the same date and only moments after committing count 1 penetrated the vagina of DS with his finger without her consent. Again, the accused knew that DS was not consenting.

[72] In view of the above, I find the accused guilty as charged of count one of sexual assault contrary to s 210(1)(a) of the Crimes Act, and guilty of count 2 of rape contrary to s 207(1) and (2)(b) of the Crimes Act, and he is, accordingly, convicted.



D.K.L Tuiqereqere
JUDGE

Solicitors:

**To: Office of Director of Public Prosecutions for the State
Office of Legal Aid Commission for the Accused**