

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

Criminal Case No: 018 of 2021

**STATE**

**-v-**

**MOHAMMED JUNIOR HASSAN**

Counsel: Ms. Uce of DPP for the State

Ms. Sharma & Ms. Prasad of LAC for the Defence

Date of Hearing: 1<sup>st</sup> May, 2024 to 26<sup>th</sup> March, 2024

Date of Judgment: 5<sup>th</sup> June 2024

**JUDGMENT**

**The name of the complainant is suppressed. Accordingly the name of the complainant will to referred to as "SS"**

1. The accused is charged with one count of Rape contrary to section 207 (1) and (2) (b) of the Crimes Act 2009.
2. The offence and its particulars are as follows;

**First Count**

## ***Statement of Offence***

**Rape:** Contrary to Section 207 (1) and 2 (a) of the Crimes Act 2009.

## ***Particulars of Offence***

**Mohammed Junior Hassan**, between the 1<sup>st</sup> day of May 2020 and the 31<sup>st</sup> day of December, 2020 at Nadi in the Western Division had carnal knowledge of “**SS**” without her consent.

3. The accused pleaded not guilty to one count of rape. The matter had proceeded to trial from 1<sup>st</sup> May 2024 and concluded on the 7<sup>th</sup> May 2024. The Prosecution presented the evidence of two witnesses, including the Complainant. The Accused remained silent during the Defence case. Afterwards, the Court heard the oral closing submissions of the Counsel for the Prosecution and the Defence. In addition to their oral submissions, the learned Counsel for the Prosecution and the Defence filed their written submissions. Having carefully considered the evidence adduced before the Court and the respective oral and written submissions of the parties, I now pronounce the Judgment of this case.

## **Burden and Standard of Proof**

4. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

## **Elements of the Offences**

### **Rape**

5. The main elements of the offence of Rape as charged on the said count areas follows;
  - i) The Accused,

- ii) Penetrated the vagina of the Complainant with his penis.
  - iii) The Complainant did not consent to the Accused to penetrate her vagina with his penis
  - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis into the complainant's vagina.
6. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed this offence against the Complainant.
7. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the Accused is sufficient to prove the element of penetration.
8. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
9. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting
10. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these facts as accurate truthful and proven beyond reasonable doubt.

11. The admitted facts are reproduced herewith as,
- i) The accused in this matter is Mohammed Junior Hassan 39 year's old, carpenter of Saunaka, Nadi at the time of the alleged offence.
  - ii) The complainant in this matter is "SS", 15 years old of Saunaka, Nadi at the time of the alleged offence.
  - iii) The Complainant was born on 10<sup>th</sup> November 2005
  - iv) The accused is the biological father of the complainant.

**Prosecution Case**

12. The complainant "SS" informed the court that she is currently residing in Lovu sea side with her husband, her mother in law, father in law, brother in law and husband's younger brother.
13. The complainant prior to residing in Lovu was residing at Koroipita for four years with her mother, two sisters and a brother. Her mother's name is Shazia Sharon Ali. Her brother's Aryan Azad Hassan. Her sister's names are Sharia Hassan and Shania Zuni.
14. Prior to this the complainant and her family were residing in Saunaka, Nadi with her family including her father the accused. Her father's name is Mohammed Junior Hassan
15. The complainant and her family were living in Saunaka Nadi during her primary school days until 2018. Prior to that she was residing with her grandfather, uncle, aunty and cousin brother near the same place in Saunaka, Nadi.
16. She recalls on year 2020 at the end of the year she was residing with her parents and siblings. It was about 11pm her mother was sleeping in her room with her

sister and the complainant was sleeping with her brother Aryan in another room. There were two bedrooms to this house, a living room and a kitchen.

17. The witness said as she opened her eyes she saw her father standing near her bed. Her brother was sleeping next to her facing the wall. She said she can see her father with the help of the lights coming from kitchen which is reflected into her room. He said he was standing and showing his erected penis.
18. She said her father came to her and shifted her waist towards where Aryan was sleeping and he lay behind her. She said on the night she was wearing a pants and one top. Her father removed her pants, short and pantie and inserted his penis into her vagina. She said at that time she was sleeping sideways. He moved back and forth for about 5 minutes.
19. At the time she was pushing him saying not to do it. She was using her elbow to push her father away from her. She did not feel good. She did not shout or yelled because she was frightened. She said Aryan was sleeping at that time.
20. According to her after 5 minutes her father than wiped the sperm with a cloth. After that her father went away. She then wore her clothes and went to sleep. She said her father was standing about 30 centimetres away from her before she raped her. She did not say anything to her father during that 5 minutes of intercourse.
21. She said when she was pushing him with back with her elbow, her father did not say anything. She said when she woke up the next day she did not tell anyone. Thus, she did not tell anyone because the bonding between her mother and herself was not good at that time. She did not tell anyone on that date.
22. She identified her father sitting in the accused box to be the person who inserted his penis into her vagina on that night. She said after that her menses stopped. She told her mother that her menses had stoooped and her mother took her to the hospital. Tests was done at the hospital and it was found to be bacterial

infection. She said that her mother and her brother went together with her to the hospital.

23. According to the witness her menses still did not come and again her mother took her to the hospital. Than the doctor conducted scan and found out that she was 8 months pregnant. She had a booking on the 3<sup>rd</sup> of December 2020. Than on the 4<sup>th</sup> of December 2020 she delivered her baby at Nadi hospital. She said her families came to visit her after her delivery.
24. She said she did not tell her mother who was the father of her child. She said she was afraid. Further she stated that he mother and aunty were pressuring her to reveal the father's name of the child. She said she told them that it was her father who had raped her.
25. After mentioning her father's name she was transferred to Lautoka Hospital. She said her mother than reported the matter to Nadi Police Station. The police wrote down her statement and she told them what her father had done to her. She was discharged from hospital after that. She confirmed that her father only raped her on that night in 2020.
26. Her statement was recorded at the complainant's home in Saunaka. She said after her father was taken by police her grandfather does not want them to stay there. They moved to Koroipita in Lautoka.
27. She said her father had done a wrong thing to her. In cross examination she agreed that there is no father's name in her birth certificate. She said that her father used to spare time to all of them. She said in there is no father's name in Aryan's birth certificate as well.
28. In cross examination she disagree that she was under pressured, she said both her father and uncle did it to her. She also agreed that the door was open but she did not know that her father wanted to do this thing to her.



29. In cross examination she said that she did not inform anyone soon after the incident because she was afraid and nobody would have trusted her.
30. In cross examination she disagreed that the reason she had alleged that her father raped her was because her father had neglected her. She said that it was in the end of the month of May, 2020 that the incident had happened. She reiterated that her father and her father's brother had both raped her.
31. In cross examination she confirmed that she did not say both their names under pressure but she had mentioned their names because they both raped her. She said her mom and her aunt did not slapped her.
32. In cross examination she said light was coming in through an opened door to her bedroom and the incident happed about 11.00pm in the night. She continue to maintain that her father did raped her. She said that what she had told the court is true and it had happened, her father raped her.
33. In reexamination she confirmed that when reading her statement then she remembered that it happened in May 2020. Again in re-examination she stated that she went to meet her father at the bus station because she wanted to forget everything and move on with her life and he invited her father to the her wedding because she forgave him.
34. **Shazia Sharon Ali** was called by prosecution as its second witness. She is the mother of the complainant and currently residing at Koroipita with her four children. She said that her eldest daughter the complainant is now married and lives at her husband's place.
35. She said that her husband's name was Mohammed Junior Hassan and they have four children. Their eldest "SS" (Complainant) was attending Nadi Muslim College.

36. She said that in November 2020 her daughter the complainant was experiencing stomach aches and she took her to the hospital for checkups. During her first check up the doctor confirmed that it was the bacteria found in her stomach that was causing the pain.
37. She was again taken to the hospital for her second checkup where it was found after she went through a scan the doctor informed her that she was 8 months pregnant. According to her the complainant delivered her baby on the 4<sup>th</sup> of December 2020.
38. She said that her sister in law and herself visited the complainant. They had asked the complainant who was the baby's father. The complainant said that it was her father and her uncle. They did something wrong to her. She said she mentioned their names. She reported the matter to the police. Her statement and the complainant's statement were recorded.
39. The police went to their home and took her husband the accused to the police station
40. In cross examination she said that there are 5 or 6 houses in the same compound at Saunaka and the complainant's relationship with he accused was fine.
41. In cross examination the witness at first stated that he took the complainant to the hospital on her delivery date. But in her statement she stated her father took her to hospital. The witness agreed that there was an inconsistency in her statement and her evidence in Court.
42. In cross examination of the witness she confirmed that she was standing there when the complainant replied to her aunty that her father and her uncle had raped her.
43. That was the end of prosecution's case. The defence opted to remain silent and will not called any witness for the defence case.



## **RECENT COMPLAINT EVIDENCE**

44. 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.
45. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint by complainant 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 her mother and her aunty 6 months after the alleged incident that the accused had impregnated her.
46. This is commonly known as recent complaint evidence. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness.
47. I accept that whatever the complainant after delivery of her baby told her mother and her aunty that the accused and her uncle had done something bad to her was sufficient enough to alert the mother that the accused done something wrong to the complainant. There is no legal requirement that a complainant is supposed to tell every detail of what he or she has encountered to the person complained to.
48. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. It is not expected that a child of 15 years or anyone for that matter who has had an unexpected sexual encounter to give every detail of the accused unlawful sexual conduct to the person the complaint is relayed to.

49. In this case the victim's mother and her aunty was relayed crucial information that the accused and her uncle had raped the complainant after complainant have given birth to her baby on the 4<sup>th</sup> of December 2020. I also accept the mother's evidence was consistent to the evidence of the complainant as the recent complaint was made to police soon after the complainant had made known to her mother that her father the accused had penetrated her vagina with his penis sometimes between the 1<sup>st</sup> of May 2020 and 31<sup>st</sup> of December 2020.

### **PREVIOUS INCONSISTENT STATEMENT**

50. During cross examination of the complainant, Defense counsel had questioned the complainant about the inconsistency in her police statement which she had given to the police when facts were still fresh in her mind with her evidence in court.
51. It was put to the complainant during cross examination that she failed to mention in her statement the month of "May" 2020 as the date when she was raped by the accused her father however, in her sworn evidence she had clearly stated that it was in the month of May. The complainant had agreed to the proposition that she had mentioned in her evidence the month of May in Cross Examination but in her police Statement paragraph 12 line 1 the month of "May" is not written in her statement.
52. Another inconsistency was raised when prosecution witness 2 the mother of the complainant had confirmed in her evidence that she took the complainant to the hospital where as in her police statement she had stated that her husband the accused had conveyed the a complainant to the hospital. Thus, the police statement is not evidence of the truth of its contents. 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. Clearly the discrepancies does not go to the root of the matter and shake the basic version of the witnesses' evidence.

53. The Court of Appeal In Lulu v State [2016] FJCA 154; AAU0043.2011 [29 November 2016] made an important observation on paragraph 14 Bhuginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280 (an appeal from a conviction for rape) demonstrated vividly the behavior of witnesses similar circumstances as follows.
- “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.*
54. The inconsistency or omission between her evidence in court and her police statement was not significant to adversely affect the credibility of the complainant. The complainant was not shaken as to the basic version of her allegations. She was consistent in her evidence as well.
55. This court is allowed to take into consideration the inconsistencies or omissions between what the witnesses told the court and her police statement when considering whether this witness was believable and credible. However, the police statement is not evidence of the truth of its contents. 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.
56. If there is any inconsistency or omission, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witnesses. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
57. In this case I find that the inconsistency does not adversely affect the credibility of the complainant Secondly, the complainant agreed on both propositions put forward by defence counsel in that the month of “May” is not reflected in the complainant’s statement to police. However the complainant had stated in her evidence that the offence happened in May, 2020. The Complainant agreeing to

both versions does not affect the credibility of the complainant. The date of the offending was between the 1<sup>st</sup> of May 2020 to 31<sup>st</sup> of December 2020.

**ANALYSIS.**

58. The fact that the accused did not give evidence and called witnesses to support the defence case does not mean that the accused is guilty. Even if I reject the version of the defence the prosecution still have to prove all the elements of the offence of Rape beyond reasonable doubt before the accused can be found guilty.
59. The prosecution are saying that the accused is the father of the complainant and both were living in the same house between 1<sup>st</sup> May 2020 to 31<sup>st</sup> December 2020. In the year 2020 the complainant was 15 years of age.
60. Hence, sometimes between 1<sup>st</sup> May 2020 and 31<sup>st</sup> December 2020 whilst the complainant's mother was asleep in another bedroom her father the accused entered her bedroom, undressed himself and lay down behind complainant. The accused then and pulled down the pants and pantie of the complainant and inserted his penis into complainant's vagina without her consent.
61. The accused after inserting his penis into the complainant's vagina without her consent and was moving back and forth for 5 minutes. The complainant was using her pair of elbows to push him away telling him not to do it. The complainant did not shout because she was afraid. The light was coming into the room from the kitchen room and complainant could clearly see the accused.
62. The prosecution submits that after 5 minutes the accused then wiped his sperm in a cloth stood up and left the room. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time. The complainant could not do anything since as she was afraid because it was her father who was doing this to her.
63. After the above acts the complainant did not tell anyone as she was afraid, the bonding between her mother and herself was not good. And when her menses



stopped for the second time, and after undergoing scan at the Nadi hospital. The doctor found that the complainant was 8 months pregnant.

64. It was only after the complainant gave birth to her child that led to the revealing of the identity of the accused by the complainant. The complainant without hesitation revealed the name of the accused and her uncle to be the person who had impregnated her.
65. The matter was reported to the police by the complainant's mother soon after the complainant revealed to her mother who had impregnated her. The complainant was medically examined. The accused was arrested and he completely denied the allegations.
66. On the other hand, the defence says the allegations are a made up story narrated in court by the complainant. The defence case theory was that the complainant had sexual relationship with her uncle and not the accused.
67. I accept the evidence of both prosecution witnesses as reliable and credible.

### **LATE REPORTING**

68. Hence, it is obvious that there was an issue of late reporting by the complainant's mother to the police. The delay is about 6 months from the date of the allegation in May, 2020. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in ***State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4<sup>th</sup> October, 2018)*** had explained this issue as follows:

*"[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-*

*"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay."*



*"[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of **Thulia Kali v State of Tamil Naidu; 1973 AIR.501; 1972 SCR (3) 622:***

*"A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well-wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered."*

69. The complainant confirmed in her evidence that she did not inform anyone of the alleged incident because she was afraid. She did not inform Premila her aunty who was someone she had a good relationship with because no one trusted her after she reported the earlier incident to them. The complainant also confirms that she was not in a good relationship with her mother and therefore she was scared to inform her of the alleged incident.
70. It was only after the complainant had delivered her baby at Nadi Hospital and was asked by her mother and aunty who had done this to her, It was only then the complainant mentioned her father and her uncle did it to her. I also accept the distressed state of the complainant when she was telling her mother and her aunty about what the accused had done to her.
71. The late reporting in my view was beyond the control of the complainant she was afraid to tell anyone about the alleged incident and when the opportunity presented itself the complainant opened up and expressed herself to her mother and aunty which led to the prompt reporting of the complaint to the police.
72. I accept that the complainant was a victim of circumstances which resulted in delayed complaint to her mother and late reporting to the police. In addition to the above, given her previous relationship with her mother she was scared to

inform her of the alleged incident and the lack of trust on her aunty (Premila) , delay in complaining and late reporting to police is unavoidable.

73. Moreover, when the complainant told her mother and aunty that the accused and uncle had impregnated her, she had narrated crucial information about what the accused had done to her which in my considered judgment was enough to alert the complainant's mother that something was not right and she immediately reported the matter to police without any further delay.
74. The Supreme Court in **Anand Abhay Raj vs. The State, CAV 0003 of 2013 (20<sup>th</sup> August, 2014)** at paragraph 39 made an important observation about the above as follows:

*The complainant need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.*
75. Although the complainant did not go into much detail when telling her mother about her pregnancy is understandable due to the age difference between the two and the relationship that existed. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial.
76. It is not expected of anyone who has had an unexpected sexual encounter to give every detail of the accused unlawful sexual conduct to the person the complaint is relayed to. Here the complainant was consistent in her evidence and in her narration of what had happened to her in conversing with her mother.
77. I accept the evidence of the complainant and the recent complaint evidence of her mother to be consistent, credible, and reliable proving all the elements of Rape beyond reasonable doubt.
78. Finally, I reject the defence assertion during cross examination of the complainant that the accused had not done anything to her without her consent

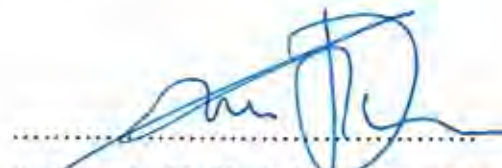
as unworthy of belief. I also refused to accept the defence assertion in cross examination that it was the uncle of the complainant alone who had raped her.

79. I do not accept that the allegations were made up by the complainant to falsely implicate the accused. The defence has not been able to create a reasonable doubt in the prosecution case.

### **CONCLUSION**

80. The court is satisfied beyond reasonable doubt that the accused Mohammed Junior Hassan between the 1<sup>st</sup> of May, 2020 to 31<sup>st</sup> December, 2020 penetrated the vagina of the complainant "SS" with his penis without her consent and at that time of the offending, the accused knew that the complainant was not consenting or reckless that the Complainant was not consenting for him to insert his penis into her vagina.
81. In view of the above, I find the accused guilty of one count of Rape and I convict the accused accordingly for the same.



  
.....  
**Sekonaia V. Vodokisolomone**  
**Acting Puisne Judge**

**At Lautoka**

**On the 05 June 2024**