

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 12 of 2021

STATE

V

PRAVEEN PRASAD RAM

Counsel : Ms. E. Cabemaiwai for the State.
: Mr. B. Makanji and Mr. A. Waqavakatoga for the
Accused.

Dates of Hearing : 13, 14 August, 2024
Closing Speeches : 16 August, 2024
Date of Judgment : 16 August, 2024

JUDGMENT

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

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

FIRST COUNT

Statement of Offence

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

Particulars of Offence

PRAVEEN PRASAD RAM on the 15th day of December, 2020 at Nadi in the Western Division, had penetrated the mouth of “M.G” with his penis, without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

PRAVEEN PRASAD RAM on the 15th day of December, 2020 at Nadi in the Western Division, had carnal knowledge of “M.G” without her consent.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

PRAVEEN PRASAD RAM on the 15th day of December, 2020 at Nadi in the Western Division, had penetrated the vagina of “M.G” with a soap, without her consent.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

PRAVEEN PRASAD RAM on the 15th day of December, 2020 at Nadi in the Western Division, had penetrated the vagina of “M.G” with two cigarettes buds, without her consent.

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

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.
4. The accused now faces three counts of rape, the evidence in respect of each count will be considered separately from the other if the accused is guilty of one count, it does not mean that he is guilty of the other counts as well. This also applies with the findings of not guilty.

ELEMENTS OF THE OFFENCE

5. In order to prove the above counts the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis/soap and two cigarette buds;
 - (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.
6. 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 vagina of the complainant with his penis/soap and two cigarette buds 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.

7. 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.
8. The second element is the act of penetration of the complainant's vagina by the penis/soap and two cigarette buds.
9. The third element is of consent, 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.
10. If this court is satisfied that the accused had penetrated the vagina of the complainant with his penis/soap and two cigarette buds 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.
11. 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.
12. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his

penis/soap and two cigarette buds into the complainant's vagina without her consent then this court must find the accused guilty as charged.

13. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
14. The slightest of penetration of the complainant's vagina by the accused penis or soap or cigarette buds is sufficient to satisfy the act of penetration.
15. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

16. 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.
17. At the outset, I wish to mention that bearing in mind the special needs of the complainant this court had arranged for a sign language interpreter to assist the court who was present throughout the evidence of the complainant. 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

18. The complainant informed the court through the sign language interpreter that she is deaf and mute and in the year 2020 she was attending Nadi Special School. On 15th December, 2020 the complainant had gone to school but the sign language class had been cancelled. The complainant was waiting for a transport to go home, after a while the accused came in a car and offered to give her a lift. The complainant refused but the accused kept on forcing her to come inside the car. This was the first time she had seen the accused despite this, the complainant went and sat in the back seat. She was getting late for home so getting a ride was the fastest way of going home.

19. The accused was not driving the car towards her home so she tapped his shoulder. The accused offered to have sex with her which she refused. The accused got hold of a stick or a rod and threatened her which made the complainant scared. The accused expressed to her that he will take her somewhere to have sex. The accused drove the car to Wailoaloa after parking the car he went to smoke came back and had forceful sexual intercourse by penetrating her vagina with his penis. The complainant expressed that it was “hard sex.” The complainant was scared and she was expressing for the accused to stop but he did not according to the complainant the accused was wanting “more” and “more.” Before having sex the accused had also smacked her. The doors and windows of the car were closed and there was no one to help her.

20. From Wailoaloa the accused drove the car to a hotel at Votualevu she was forced by the accused to go into the hotel. The complainant saw the accused give \$20.00 to the hotel owner. The complainant was pulled to the room by the accused as well. She did not try to run away or seek help.
21. In the room the accused removed her clothes and bra and he inserted soap inside her vagina which was painful and thereafter cigarette buds after he finished smoking. The complainant tried to stop the accused but he did not stop. After this, the accused forced her to wear her clothes and drove her to Namaka where he left her. The same day the complainant reported the matter to the police. The complainant identified the accused in court.
22. In cross examination the complainant expressed that she was standing at the Nadi Temple then she started walking she stopped when the accused stopped his car and signaled to her to sit in his car. Since she was getting late for home she had stopped the car. The complainant denied signaling to the accused to ask if he wants to have sex with her. When it was suggested that the accused wanted to have sex with her only after her signal to him the complainant maintained that it was the accused who had signaled to her that he wants to have sex with her.
23. The complainant denied the accused had asked her how much was her cost and that she had shown her two fingers. Furthermore, the complainant denied the accused had asked if the two fingers meant \$20.00. The complainant agreed the accused wrote on a piece of paper \$20.00 which she thought was for the fare. The complainant denied shaking her head and adding a zero to make it \$200.00. The complainant did not agree that the accused had told her he can pay her \$75.00.
24. At the hotel the accused went out of the car and paid for the room while the complainant was sitting in the car and watching. The complainant did

not ask for help from the hotel boss because she was scared of the accused who came to the car and pulled her out and took her to the room. Upon further questioning the complainant expressed that she was signaling no, no but the hotel boss was looking the other way and had walked away.

25. When it was suggested that the reason why she did not seek help was because she was with the accused for the purpose of having sex, the complainant expressed that she was forced. In the hotel room the complainant denied that she had indicated her charges were \$200.00. The complainant expressed that this was a lie she did not want \$200.00 and there was no agreement for the payment of \$75.00 to her by the accused.
26. The complainant denied the accused wore his clothes and told her he was leaving, she also denied that she was crying when the accused wanted to leave she expressed that she was angry since the accused had forceful sex with her which was painful and she was unable to walk.
27. The complainant maintained that the accused had forceful sexual intercourse with her that day and he had done whatever she told the court. Furthermore, the complainant expressed that in the hotel room the accused at first inserted the soap inside her vagina and then after smoking he inserted the cigarette buds inside her vagina as well. When the complainant went to the hospital the soap and the cigarette buds were removed by the doctor.
28. The complainant agreed that it was on the next day of the incidents she had given her police statement when everything was fresh in her mind. The complainant told the sign language interpreter in the police station everything that had happened. She had also read and signed after checking the police statement.

29. The complainant was referred to her police statement dated 16th December, 2020 which mentioned that the accused after picking her drove her to the motel. The complainant confirmed the above in her police statement, when it was put to her that in her evidence she told the court that she was taken to Wailoaloa before going to Votualevu the complainant said that she had missed this sentence in her police statement. The complainant maintained that apart from the absence of the Wailoaloa incident everything was true in her police statement.
30. In re-examination the complainant expressed that when she sat in the car she was going to be dropped at her home but she was taken to Wailoaloa and then to Votualevu by the accused.

PREVIOUS INCONSISTENT STATEMENT

31. This court directs its mind to the fact that the defence counsel in the cross examination of the complainant had questioned her about an inconsistency in her police statement which she had given to the police when facts were fresh in her mind with her evidence in court.
32. This court is allowed to take into consideration the inconsistency between what the complainant told the court and her police statement when considering whether the complainant is 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.
33. 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 complainant. 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.

34. The final witness Dr. Ilisapeci Cama informed the court that she graduated with MBBS degree from Fiji School of Medicine in 2018. Currently she is working for Pacific Specialist Health Care, Nadi. In the year 2020 the witness was based at the Nadi Hospital and on 16th December, 2020 she had attended to the complainant. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.
35. According to the witness the patient was accompanied by police officers and an interpreter. The patient was in shock and looked frightened. The patient informed the doctor that a person in a private vehicle had offered to drop her home but instead redirected the patient to another area in Votualevu and forcefully raped her and then inserted a quarter bar soap and cigarette buds.
36. The specific medical findings of the doctor were:
 - (a) There was external inferior part of vaginal opening tear with blood stains;
 - (b) Whitish discharge on external vaginal area;

- (c) On speculum examination a piece of soap measuring 5 cm by 6 cm and two cigarette buds were removed from the patient's vagina.
37. The doctor further stated that the injury was recent around the vaginal area and her medical findings were consistent with the history relayed by the patient.
38. In cross examination the doctor stated that the tear she had seen could have been caused by forceful penetration through the vaginal opening which would definitely cause a tear in the labia minora. The doctor further stated that the tear could have been by a penis or a finger.
39. In respect of the whitish discharge the doctor stated that there was no independent result to confirm it was semen but a clinical theory and there could be other possibilities such as discharge from the victim, saliva, water splashed or urine. In respect of the position of the soap and the cigarette buds inside the vagina the victim would not have removed it since these items were right inside in front of the cervix which is part of the uterus.

RECENT COMPLAINT EVIDENCE

40. 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.

41. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that the complainant told Dr. Cama during her medical checkup on the next day of the allegation that she was at the bus stop near the temple at the Nadi town end when a private vehicle driver offered to take her home but instead drove her to Votualevu and forcefully raped her and then inserted a quarter bar soap and cigarette buds into her vagina.
42. This is commonly known as recent complaint evidence. The evidence given by Dr. Cama is not evidence of what actually happened between the complainant and the accused since this witness was not present and did not see what had happened.
43. 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. Cama the driver of the vehicle that had offered to take her home but had raped and inserted soap and cigarette buds in her vagina. Furthermore, the complainant made a prompt police complaint which resulted in a medical report which shows an injury on the virginal opening and the removal of soap and cigarette buds from inside her vagina and therefore the complainant is more likely to be truthful.
44. On the other hand, the accused says the complainant did not tell the truth to the doctor. She did not tell the doctor that she had offered to have sex with the accused and after a disagreement over payment the accused wore his clothes and had left. The complainant started to cry and in her anger she made up a false story to blame the accused.

45. The defence further states that in her evidence the complainant told the court that she was taken first to Wailoaloa and then to Votualevu but there is no mention by the complainant to the doctor that she was taken to Wailoaloa and therefore she should not be believed.
46. 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

47. This court has heard the evidence of Dr. Cama who had been called as an expert 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 report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.
48. 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 doctor. 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 expert it does not have to act upon it. Indeed,

this court does not have to accept even the unchallenged evidence of the doctor.

49. The evidence of the doctor relates 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.
50. This was the prosecution case.

DEFENCE CASE

51. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination and he also called two witnesses. This court must also consider the defence evidence and give such weight as is appropriate.
52. The accused informed the court that on 15th December, 2020 he was driving his car from Navo, Nadi going home towards Martintar. In front of Nadi Temple he saw the complainant standing in the opposite lane who signaled for him to stop the car.
53. The complainant walked from the opposite side towards the car opened the back door and sat. The accused asked where she was going the complainant started signaling indicating she wants to drink beer and with her hands she indicated that she wanted to have sex. The accused agreed and both signaled to each other to go to a hotel.

54. The accused knows the owner of a hotel at Votualevu who is his father's friend. At the hotel he paid \$30.00 for 2 hours, the complainant was sitting in the car at the car park. Shortly after both entered the room, for half an hour they drank beer. After sometimes the complainant demanded money from the accused by showing her two fingers. The accused thought she was asking for \$20.00 to be sure he gave a pen and paper to the complainant who wrote \$200.00.
55. By action the accused informed the complainant that he did not have that much money but he had \$27.00 out of which he offered her \$20.00. The complainant shook her head indicating no, the accused told the complainant it is better that he goes home by this time the complainant had removed her clothes and she was wearing the towel. The accused had also removed his shirt so he wore his shirt picked the keys and the cigarettes and then opened the door.
56. At this time the complainant was having her shower so he waited for her. The accused denied committing the offences alleged he stated that he did not do anything to the accused or force her to do anything. In the room they had smoked 6 to 7 cigarettes after the complainant had her shower both left the room. On the way out the accused met the owner of the hotel who asked the accused "you are going so early." The accused responded the complainant was not in good mood and not having the right mindset. After this both left in the car and he dropped the complainant at Namaka.
57. In cross examination the accused denied that he had forced the complainant to get into his car and that he wanted to have sex with her so he had driven her to Wailoaloa. The accused stated that it was around 2pm they had arrived at the hotel, however, he had not forcefully pulled the complainant out of the car to the room. The accused denied he had threatened the complainant in the room, when the accused was talking

with the owner of the Hotel after leaving the room the complainant was with him.

58. The accused denied all the allegations raised against him by the complainant, he maintained that the complainant had asked for \$200.00 from him.
59. The next defence witness Jaswant Singh informed the court that he is the owner of a hotel at Votualevu, Nadi. On 15th December, 2020 the accused brought an Itaukei girl and they went inside a room. When the accused was leaving the hotel room he did not meet the accused. The witness just saw the accused driving away and at no time had the accused said anything to him before driving away.
60. In cross examination the witness stated that the accused came at about 9.30 am and had left about 2 or 3pm. At the time of check in the accused had stated that he will be staying till the afternoon.
61. The final defence witness Manbeer Singh informed the court that his father owns a Guest House and a shop at Votualevu, Nadi. He looks after the shop, which is next to the Guest House. The witness was able to recognize the accused who was brought by the police officers for an investigation. The witness had seen the accused come to the guest house with a girl and both left during lunch time in a car.
62. This was the defence case.

ANALYSIS

63. The prosecution alleges that the accused on 15th December, 2020 offered a lift to the complainant in his car. The complainant is a special needs individual who is deaf and mute. The complainant was able to communicate with the accused in the sign language which he was able to understand. However, despite telling the accused to stop at a place where she will catch a bus to go home the accused drove the car to Wailoaloa. In the car the accused threatened the complainant with a stick or a rod which made the complainant scared.
64. At Wailoaloa the accused left the car and went to smoke when he came to the back seat he had forceful sexual intercourse with the complainant. The complainant did not consent to have sexual intercourse with the accused, however, he overpowered her. According to the complainant the accused had "hard sex". There was no one around at the time, penetration of the accused penis into the complainant's vagina was painful and she had expressed to the accused to stop but he did not and wanted more.
65. From Wailoaloa the accused drove to Votualevu to a hotel where he booked a room. The accused forcefully pulled the complainant out of the car and walked her to the room. The complainant was so scared of the accused that she did not signal to the owner of the Hotel that she was in trouble.
66. In the room the accused forcefully removed the complainant's clothes and he started to smoke. After a while he overpowered the complainant and forcefully inserted a piece of soap and two cigarette buds into the vagina of the complainant. The accused dropped the complainant at Namaka and left.

67. The complainant went and reported the matter to the police. Early morning the next day the complainant was medically examined, the doctor noted a tear on the vaginal opening and had removed two cigarette buds and a piece of soap from inside the complainant's vagina. The professional opinion of the doctor was that there was forceful penetration of the complainant's vagina.
68. Finally, the prosecution submits that the complainant did not know the accused and she did not consent for the accused to do what he did to her that day.
69. On the other hand, the defence says the allegations are a made up story narrated in court by the complainant. The truth is that the complainant and the accused did not have any sexual intercourse that day and the accused had not penetrated the complainant's vagina with a piece of soap and two cigarette buds as alleged.
70. It was the complainant who had flagged the car the accused was driving, and from the other side of the road she came running and sat in the back seat. The accused soon realized that the complainant was deaf and mute so they started communicating with each other in the sign language. In the car the complainant signaled to the accused that she wanted to drink beer and have sexual intercourse. The accused agreed so he drove to a hotel in Votualevu where he booked a room and both went into the room. In the room the complainant demanded \$200.00 but the accused only offered \$20.00. The complainant did not agree so the accused left the room and dropped the complainant at Namaka in his car.
71. The defence further stated there was nothing untoward about taking the complainant to the hotel because that is what she wanted. While going

into and coming out of the hotel the complainant did not express to anyone that something wrong had happened to her. The situation turned sour after the accused refused to pay her \$200.00 demanded by her since he did not have this amount of money on him. When the accused indicated he can give \$20.00 the complainant started to cry and her behaviour towards the accused changed and then she made these false allegations.

72. Finally, the defence submits that this is a case of the complainant asking for an exorbitant amount of money from the accused and when she was not given the money a false police report was made against him. The complainant did not tell the truth in court when she expressed that from Nadi Temple she was driven to Wailoaloa. The complainant gave a police statement the next day of the allegations but there is no mention of the accused taking the complainant to Wailoaloa from Nadi Temple.
73. In respect of the medical report the defence is asking this court not to give any weight to the medical findings since it is not conclusive and in no way it implicates the accused. The swabs taken were not analyzed particularly the whitish substance which the doctor incorrectly assumed was semen.
74. Finally, the defence is asking this court not to give any weight to the evidence of the complainant. The complainant was not restrained by the accused at any time and there was nothing for the complainant to be afraid of. The complainant has made false allegations against the accused after her demand of \$200.00 was not met by the accused.

DETERMINATION

75. 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.

76. In this case, there are two different versions, one given by the prosecution and the other by the defence. 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.
77. 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).
78. 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.”

79. 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 the Court of appeal had stated 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].

80. I have also kept in mind the observations made by Prematilaka RJA sitting as a single judge of the Court of Appeal in *Josaia Naikalivou vs. The State*, AAU 017 of 2022 (26th March, 2024) at paragraph 9 as follows:

In Murray v The Queen (2002) 211 CLR 193 at 213 [57] Gummow and Hayne JJ, in the High Court of Australia made it clear that it is never appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence

evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt. In R v Li (2003) 140 A Criminal R at 288 at 301 it was again held that the issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth. This seems to be what exactly the trial judge had done in the judgment.

81. The defence argument apart from denial is that there was a motive on the part of the complainant to make false allegations against the accused since she had demanded \$200.00 in return for sexual intercourse which the accused could not pay.
82. 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.
83. 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].'

84. There is no dispute as to the identification of the accused it is agreed between the prosecution and the defence that it was the accused who had picked the complainant from Nadi Temple in his car.

85. After carefully considering the evidence adduced by the prosecution and the defence, I do not accept the evidence of the complainant as truthful and reliable when she expressed to the court that the accused had driven her to Wailoaloa from Nadi Temple. The reason for this conclusion is based on the fact that the complainant had given her police statement on the

next day of the incident when facts were fresh in her mind but she did not mention anything about being driven to Wailoaloa from Nadi Temple.

86. The reason given by the complainant that she had missed a sentence to this effect in her police statement is not a satisfactory explanation. The inconsistency and/or omission is significant in view of the fact that the complainant was adamant that she had read the police statement and was sure of the contents before signing.
87. Furthermore, on the same day the complainant was seen by a doctor in private in the presence of an interpreter and yet again the complainant did not tell the doctor that she was driven to Wailoaloa. In view of the above, this court is not satisfied beyond reasonable doubt that the accused had raped the complainant at Wailoaloa as mentioned in count two of the information filed.
88. However, in respect of counts three and four this court accepts the evidence of the complainant as truthful and reliable when she told the court that in the hotel room the accused had forcefully inserted a piece of soap and cigarette buds inside her vagina without her consent.
89. The complainant gave a consistent account of what the accused had done to her. The complainant was also able to withstand cross examination and she was not discredited as to the main version of her allegations in counts three and four. There was no motivation by the complainant to falsely implicate the accused they were basically strangers and it is improbable that the complainant would immediately after sitting in the accused car wanted to drink beer and have sexual intercourse with him.
90. The medical report of the complainant speaks for itself. The doctor had to remove the cigarette buds and a piece of soap from the complainant's

vagina which the complainant could not have removed. There was no suggestion by the defence that the complainant had self-inflicted the foreign items inside her vagina.

91. Furthermore, the complainant was prompt in her responses and what she told the court is probable, she was also consistent in her evidence and cross examination and there was no iota of any bias by the complainant against the accused upon the totality of her evidence.
92. The complainant was steadfast in what she had encountered in the hotel room and she was able to express herself clearly. I have no doubt in my mind that the complainant told the truth in court.
93. I accept that it was the accused and no one else who had forcefully penetrated the complainant's vagina with soap and cigarette buds. The complainant had promptly reported the matter to the police and had relayed the incidents to the doctor which gives credence to the evidence of the complainant.
94. I reject the defence assertion that the complainant had a motive to falsely implicate the accused as far-fetched and unbelievable. On the evidence I accept that there was no motivation on the complainant to falsely implicate the accused.
95. In respect of the contention that the complainant did not draw the attention of the hotel owner I would like to state that 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 circumstance of the complainant that she was under the control of the accused and she was scared of him is a crucial factor in this regard.

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.

96. The fact that the complainant did express herself to the hotel owner but was not able to get the attention of the hotel owner can be attributed to her special disability of being mute. I accept and agree with the complainant that she had not consented to what the accused had done to her in respect of counts three and four.
97. 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 the accused had forcefully inserted and/or penetrated the soap and the cigarette buds into her vagina. The complainant was not shaken as to the basic version of her allegations.
98. The Court of Appeal in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at paragraph 107 stated the following about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made by the Indian Supreme Court in *State of UP v. M K Anthony (1985) 1 SCC 505*:

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may

differ is some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...'

99. The situation of the complainant ought to be considered holistically. As soon as the accused left, the complainant without hesitation went to the police station and reported the matter. I accept the opinion of the doctor that the injury seen in the complainant's vaginal opening was recent and as a result of forceful penetration. I also accept that whatever the complainant told the doctor was what the complainant had experienced.
100. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. In this case the complainant told the doctor about what the accused had done to her in detail and the medical findings of the doctor were consistent with the history provided.
101. The Supreme Court in *Anand Abhay Raj vs. The State*, CAV 0003 of 2013 (20th August, 2014) at paragraphs 37 to 39 made an important observation about the above as follows:

*[37] 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** [1998] UKPC 38; [1999] 1 AC 210 at p215H. This was done here.*

[38] 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.

[39] The complaint 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. The judge should point out inconsistencies. These he referred to in an earlier paragraph.

102. The doctor had also observed that the complainant was frightened and in shock upon her initial impression of the complainant shows that the complainant had undergone an unexpected experience. I accept the evidence of complainant and the doctor as reliable and credible.
103. On the other hand, the accused did not tell the truth he gave a version of events which is not tenable or plausible on the totality of the evidence. I reject the defence assertion that the accused did not do anything to the complainant in the hotel room as improbable and unworthy of belief.
104. The accused brought in the issue of financial demand by the complainant is a well thought out notion to divert attention away from the allegations raised. The accused in his evidence was playing victim and portraying himself as a person who did not want to do with the complainant after his so called agreement with the complainant had not been successful. The narration given by the accused in this regard lacked the goodness of a genuine happening.
105. The accused very confidently said that when he was leaving the hotel room he met the owner of the hotel and they had a conversation. This was contradicted by the defence witness Jaswant Singh the owner of the hotel who told the court that he only saw the accused leaving the hotel in his car and there was no conversation between the two.

106. Jaswant Singh and Manbeer Singh were honest witnesses who told the truth that they were not in close proximity with the accused after the accused was leaving the hotel. I do not give any weight to the evidence of the accused that the complainant had asked for \$200.00 which he could not afford and therefore he left the hotel room to drop the complainant is an unreliable account of what he had done to the complainant that day.
107. I do not accept that the allegations were made up by the complainant to falsely implicate the accused. On a review of all the evidence before this court I am satisfied beyond reasonable doubt that the accused had done what the complainant had alleged. The fact that the accused was smoking in the hotel room also gives credence to the evidence of the complainant that it was the accused who had penetrated her vagina with the cigarette buds.
108. In view of the above, the defence has not succeeded in raising a reasonable doubt in the prosecution's case.

CONCLUSION

109. This court is satisfied beyond reasonable doubt that the accused on 15th December, 2020 had penetrated the vagina of the complainant with a piece of soap and two cigarette buds without her consent.
110. This court also accepts that the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
111. In view of the above, I find the accused guilty of two counts of rape being counts three and four as charged and he is convicted accordingly. Due to

lack of evidence the accused is acquitted of two counts of rape being counts one and two.

112. This is the judgment of the court.



Sunil Sharma

Judge



At Lautoka

16 August, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.