

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

**Crim. Case No: HAC 163 of 2023**

**STATE**

vs.

**RAFAELE DAU**

**Counsel:** Ms. K. Dugan for the State  
Ms. R. Nabainivalu for Accused

**Dates of Hearing:** 18<sup>th</sup> November 2024

**Date of Closing Submission:** 19<sup>th</sup> November 2024

**Date of Judgment:** 26<sup>th</sup> November 2024

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**JUDGMENT**

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1. The name of the Complainant is suppressed, and she will be referred to as “AA”.
2. The Acting Director of Public Prosecution filed this Information on the 11th of July 2023, charging the Accused, Mr. Rafaele Dau, with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offence are:

***COUNT 1***

*Statement of Offence*

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

### Particulars of Offence

**RAFAELE DAU** on the 8<sup>th</sup> day of May, 2022 at Suva, in the Central Division, penetrated the vagina of **AA** with his penis, without her consent.

3. Consequent to the plea of not guilty entered by the Accused, the matter proceeded to the hearing. The hearing commenced on the 18th of November, 2024, and concluded on the same day. The Prosecution presented the evidence of two witnesses, including the Complainant. The Accused gave evidence for the Defence. The Court then heard the closing submissions of the learned Counsel for the Prosecution and the Defence. In addition to their respective oral submissions, both learned Counsel filed their respective written submissions. Having carefully considered the evidence adduced during the hearing and the parties' respective oral and written submissions, I now pronounce the judgment on this matter.

### **Burden and Standard of Proof**

4. The Accused is presumed to be innocent until he is 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 he is 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**

5. The main elements of the offence of Rape as charged are:
  - 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 fingers in that manner.

6. The first element is the Accused's identity. The Prosecution must prove beyond a reasonable doubt that the Accused committed this offence against the Complainant. There is no dispute about the identification. The Accused and the Complainant are known to each other.
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. The Complainant must have the freedom to make a choice. It means she must not be pressured or forced to make that choice. Moreover, the Complainant must have the mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
10. 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.

### **Admitted Facts**

11. The Accused tendered the following admitted facts under Section 135 of the Criminal Procedure Act.

1. *The name of the person charged is Rafaele Dau referred as [“Rafaele”], 34 years of age at the time of the alleged offence [DOB: 11/02/1988] and resides at Vuci South Settlement, Nausori.*
2. *The Complainant is one “AA” referred as [“AA”], 14 years of age at the time of the alleged offence [DOB: 02/03/2008] and resides at Sawarua Settlement, Lokia, Nausori.*
3. *Rafaele and AA are known to each other as they were members of the same church which is CMF Church in Kinoya. Thus, there is no dispute as to the identification of the Accused in this matter.*
4. *On 8<sup>th</sup> May 2022, at 63 Vinod Place, Vatuwaqa, Rafaele penetrated the vagina of AA with his penis.*
5. *It is not disputed that Rafaele is the biological father of the baby of AA given that AA is the biological mother.*
6. *Rafaele was interviewed under caution on 23<sup>rd</sup> November, 2022 in the English Language by D/SGT 4701 Jekope Nakula.*
7. *Rafaele was formally charged on 13<sup>th</sup> May 2023, in the English Language by PC 5605 Gukisuva.*
8. *The following document is not disputed and hereby tendered by consent as Prosecution Exhibit.*
  - (i) *Birth Certificate of AA.*
  - (ii) *Forensic DNA Report by Nacanieli Gusu dated 1<sup>st</sup> May 2023.*

### **Evidence of the Prosecution**

12. The Complainant was fourteen years old in 2022 and residing with her parents and two younger siblings at Lokia. On the 8th of May 2022, she went to her grandmother’s house to celebrate Mothers’ Day with her church group. Her mother did not join; hence, she went there with one of her younger siblings. She had known the Accused for some time as he was part of their church.

13. While attending to the chores at her grandmother's house, preparing for the celebration, she noticed that the Accused had asked her to come to one of the three bedrooms. She then went into that bedroom, where the Accused asked her to look for his mobile phone charger. The Accused held on her shoulder and pushed her to the mattress on the floor. He then laid on top of the Complainant and removed her shorts and undergarments. He took his penis and then started to rub it on her vagina. The Complainant tried to shout, but his chest covered her mouth. He was strong and big, which made it impossible for her to push him away. After rubbing his penis on her vagina, the Accused penetrated her vagina with his penis. He penetrated her vagina with his penis for about five minutes until he ejaculated. The Accused then dressed and told the Complainant not to tell anyone about this incident. The Complainant left the room and joined the other for celebration.
14. The Complainant did not inform anyone about this incident, including her parents, until her mother inquired about the irregularity of her menstruation. It happened nearly six months after this alleged incident. The Complainant's father had told her mother that he suspects that the Complainant was pregnant and requested the mother to inquire about it. The mother accordingly asked the Complainant, and then the Complainant revealed to her mother that the Accused penetrated her vagina with his penis without her consent on the 8th of March 2022. Later, it was found that the Complainant was pregnant.

### **Evidence of the Defence**

15. The Accused admitted that he is the biological father of the Complainant's child and also admitted that he penetrated the vagina of the Complainant with his penis on the 8th of March 2022 at the Complainant's grandmother's house.
16. The Accused testified in his evidence, explaining that the Complainant came to the room while he was arranging earrings for the mothers and closed the door. The Complainant then kissed him, asking for his mobile phone for her to use. She then lifted her skirt and started to rub her private parts on his. Afterwards, the Complainant took his penis out and inserted

it into her vagina until he ejaculated. The Complainant told the Accused not to tell her mother about this incident.

17. According to the evidence presented by the Prosecution and the Defence and the admitted facts, there are two main issues that the Court has to determine, i.e. the manner and the circumstances of the penetration of the vagina of the Complainant and then whether the Complainant consented to the Accused to penetrate her vagina with his penis in that manner. According to the Accused's evidence, it is clear that he had admitted insofar as to penetration of the vagina of the Complainant with his penis but the nature, the manner and the circumstances of the penetration.

### **Evaluation of the Evidence**

18. Appraising the evidence presented by the Prosecution and Defence, I shall now proceed to evaluate the evidence with the applicable law. In doing that, the Court must first look into the credibility or the veracity of the evidence given by the witnesses and then proceed to consider the reliability or accuracy. In doing that, the Court should consider the 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. (**vide; *Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).***)
19. I first draw my attention to the Defence's evidence. The Accused is not required to give evidence. He does not have to prove his innocence, as it is presumed by law. However, in this case, the Accused gave evidence. Therefore, the evidence presented by the Defence needs to be considered when determining the facts of this case.
20. Lord Reading CJ in **Abramovitch (1914) 84 L.J.K.B 397** held that:

*"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases; it always remains on the prosecution."*

21. Accordingly, if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offence. If the Court rejects the Accused's version, that does not automatically imply that the Prosecution has established that the Accused is guilty of the crime. The Prosecution must satisfy that it has established, on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed this offence as charged in the Information. (**vide; Naidu v State [2022] FJCA 166; AAU0158.2016 (24 November 2022), Liberato and Others v The Queen ((1985) 159 CLR 507 at 515), Abramovitch (1914) 84 L.J.K.B 397**)
22. Comprehending the preceding legal principles and the precedence on the onus of the Prosecution in proving the case beyond a reasonable doubt, I now evaluate the evidence presented by the parties to determine the testimonial trustworthiness of the evidence. As I mentioned before, the Court needs to consider two aspects in deciding the testimonial trustworthiness of the evidence, i.e. the credibility of the witness evidence and the reliability of the evidence.
23. The Accused's evidence suggests that the Complainant invaded his privacy and forcefully put his penis into her vagina, forcing the Accused to engage in sexual intercourse with the Complainant until he ejaculated. I observed the physical structures of the Accused and the Complainant while they gave evidence and found a discernible disparity in their physical buildup and strength. The Court is acutely conscious that this alleged incident occurred two years ago; thus, their physical appearance in 2022 may not be the same as now. However, it

is not unsafe to conclude that it is impossible to accept that the Complainant, who was fourteen years old at the time of this alleged incident, had forced a strongly built grown-up adult man like the Accused to engage in sexual intercourse with her against his will, by forcefully putting his penis inside her vagina. It is apparent that the Accused had enough physical strength and the capabilities to avoid any such sexual assault on him by a fourteen-year-old, not strongly built teenage girl. Accordingly, the Court could conclude that the evidence given by the Accused is not true or may not be true; thus, the Defence failed to create any reasonable doubt about the Prosecution's case.

### **Delay**

24. The central plank of the Defence's submission challenging the credibility and reliability of the Prosecution's case is founded on the allegation of delay in reporting this matter, suggesting the considerable delay affects the credibility and reliability of the Complainant's evidence.
25. I shall now determine whether the delay in reporting this matter affected the credibility and reliability of the Complainant's evidence. Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014 (the 4th of October 2018)** has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution's case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
26. The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence if there is an unsatisfactory explanation for the delay or unexplained delay. ( **vide; Masei v State [2022] FJCA 10; AAU131.2017 (3 March 2022)**)



27. The Complainant was a fourteen-year-old girl at the time this incident occurred. She explained that she was scared of telling her mother as she was worried about their reaction. She feared that her parents would disown her, forcing her to leave them. It is not impossible or improbable that a fourteen years old girl who encountered such a traumatic sexual assault by a known person within her church group at her grandmother's house during a church function would be afraid, as explained by the Complainant, to tell anyone but keep that unpleasant event into herself. Therefore, I find no reason to conclude that the delay in reporting this matter has adversely affected the credibility and reliability of the evidence given by the Complainant.

### **Recent Complaint**

28. The Prosecution presented the evidence of the Complainant's mother, as a witness of the recent complaint. The Complainant told her mother about this incident when the mother inquired about her irregular menstruation. After she confided to her mother about this incident, they found that the Complainant was pregnant.
29. Gates CJ in **Raj v State [2014] FJSC 12; CAV0003.2014 (the 20th of August 2014)** has defined the evidence of a recent complaint outlining its scope and application. Accordingly, the evidence of the recent complaint is not evidence of facts complained of but evidence that connects to the issue of consistency or inconsistency of the evidence given by the Complainant. Hence, the evidence of the recent complaint could enhance the credibility and reliability of the evidence presented by the Complainant. The evidence of the recent complaint does not establish the facts of which the Complainant testified or disprove those facts. It only establishes the consistency of the Complainant, establishing that she has stated a similar version of events she alleges in her evidence to the recent complaint witness. The Complainant is not required to disclose the details of the offence, covering all the ingredients. It is sufficient to explain the material and relevant alleged sexual conduct allegedly committed by the perpetrator.

30. In her evidence, the Complainant's mother explained what the Complainant had revealed about this incident, which is consistent with the Complainant's evidence. Considering the consistent nature of the Complainant's and the mother's evidence, I find the evidence that the Complainant's mother gave asserted the credibility and reliability of the Complainant's evidence.
31. There are no discernible contradictions *inter se* and *per se* in the evidence given by the Prosecution witnesses. The Complainant was consistent, coherent, and affirmative in her evidence.

### **Conclusion**

32. Considering the above reasons, I am inclined to find the Complainant's evidence credible and reliable; thus, it is the truth. This conclusion leads me to conclude that the Prosecution has proven the charges against the Accused beyond reasonable doubt.
33. In conclusion, I find the Accused guilty of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act, and convict of the same accordingly.



A handwritten signature in black ink, appearing to be "R. D. R. T. Rajasinghe".

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**Hon. Mr. Justice R. D. R. T. Rajasinghe**

### **At Suva**

26<sup>th</sup> November 2024

### **Solicitors**

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.