

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CRIMINAL JURISDICTION**

**Criminal Case No. HAC 121 of 2023**

**BETWEEN** : **STATE**

**AND** : **PARMESH KUMAR**

**Counsel** : Ms S Bibi for the State  
Mr M Yunus & Mr Prasad for the Accused

**Hearing** : 27 & 29 November 2024

**Closing addresses** : 13 December 2024

**Judgment** : 28 January 2025

**JUDGMENT**

[1] The complainant has been granted name suppression. Therefore, any public record of these proceedings must not contain any information that may lead to the identity of the complainant. She is referred to as ‘CH’ in this Judgment. I have deliberately avoided identifying details that may lead to identifying the complainant.

[2] The accused is charged with four counts. These are as follows:

**Count 1**

***Statement of Offence***

**INDECENT ASSAULT**: *Contrary to section 212(1) of the Crimes Act 2009.*

***Particulars of Offence***

**PARMESH KUMAR** on the 20<sup>th</sup> day of August, 2022 at Nehru Primary School carpark, Suva in the Central Division, unlawfully and indecently assaulted **CH** by touching her thighs and her vagina over her clothes.

**Count 2**

***Statement of Offence***

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

***Particulars of Offence***

**PARMESH KUMAR** on the same occasion as in Count 1, procured **CH**, without her consent, to commit an act of gross indecency by making her touch his penis.

**Count 3**

***Statement of Offence***

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

***Particulars of Offence***

**PARMESH KUMAR** on the same occasion as in Counts 1 and 2, penetrated the mouth of **CH** with his penis, without her consent.

**Count 4**

***Statement of Offence***

**INDECENT ASSAULT**: *Contrary to section 212(1) of the Crimes Act 2009.*

***Particulars of Offence***

**PARMESH KUMAR** on the 16<sup>th</sup> day of March, 2023 at Makoi in the Central Division, unlawfully and indecently assaulted **CH** by touching her thighs and her vagina over her clothes.

[3] The accused denies having committed the offences.

[4] The accused is alleged to have raped the complainant on 20 August 2022 by penetrating the mouth of the complainant with his penis without her consent. The accused is also alleged to have indecently assaulted the complainant on the same day by touching her thighs and vagina over her clothes as well as sexually assaulted her that same day by procuring her to touch his penis. Finally, the accused is alleged to have indecently assaulted the complainant on 16 March 2023 by touching her vagina over her clothes.

**Counts 1 & 4 – Indecent assault**

[5] Indecent assault is an offence under s 212(1) of the Crimes Act. To establish the two offences of indecent assault the prosecution must prove the following elements beyond a reasonable doubt:

1. That:
  - i. on 20 August 2022, the accused touched CH on her thighs and vagina over her clothes;
  - ii. on 16 March 2023 the accused touched CH on her vagina over her clothes.
2. Each assault was indecent and unlawful.
3. The assaults were without the consent of the complainant.
4. The accused knew the complainant was not consenting.

[6] The elements for the offence of indecent assault were discussed by the High Court in *Fareed v State* [2022] FJHC 718 (11 November 2022). Temo J (as he was then) stated:

*12. Under the Crimes Act 2009, an offence must have a physical element and fault element (Section 13 (1), 15(1) and 18(1) of the Crimes Act 2009). For “indecent assault”, the physical element of the offence is the accused’s conduct of “assaulting the complainant”. The fault element of “indecent assault” is the accused’s “intention of assaulting the complainant unlawfully and indecently”. Both the physical and mental elements of the offence must be satisfied by the prosecution, beyond reasonable doubt, before an accused can be found guilty of “indecent assault” (Section 14 of the Crimes Act 2009).*

*13. It was often said that “the least touching of another in anger is an assault”. It is the unlawful application of force to the person of another. Although the touch may not be painful, nevertheless the touching is in law an application of mild force on the person of another. It is still unlawful, unless the person receiving the touch had given her or his consent, or alternatively, there are other justification in law for the conduct. The touch or conduct becomes indecent if*

*right thinking members of society considers the same to be indecent, given the surrounding circumstances. It was the court that will have to decide the issue of “indecenty”, taking into account as a guide the views of “right thinking members of society” (State v Isoa Rainima, Criminal Case No. HAC 064 of 2017S, High Court; Suva, Archbold, Pleading, Evidence & Practice in Criminal Cases, 42 ed.,1985;Peter Gillies, Criminal Law, 4<sup>th</sup> ed, 1997, pages 604 to 612).*

## **Count 2 - Sexual Assault**

- [7] Sexual assault is an offence contrary to s 210(1)(b)(i) and (2) of the Crimes Act.
- [8] To establish the offence of sexual assault, the prosecution must prove the following elements beyond a reasonable doubt:
1. On 20 August 2022, the accused procured the complainant to make her touch his penis.
  2. The assault was unlawful and indecent.
  3. The assault was without the consent of the complainant.
  4. The accused knew that the complainant was not consenting.

## **Count 3 – Rape**

- [9] The offence of rape has three elements: the penetration of a complainant’s vagina, anus or mouth by an accused with their penis, finger or an object, the complainant not consenting to sexual penetration, and the knowledge of the accused that the complainant was not consenting.<sup>1</sup> The slightest penetration is sufficient to establish the element of penetration.

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<sup>1</sup> Section 207(2).

[10] According to s 206 of the Crimes Act, the term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation, will not be considered as consent freely and voluntarily given. Consent or the absence of consent can be communicated by the words or acts of the complainant. The knowledge of the accused that the complainant did not consent is a matter for inference from all the proven facts.

[11] To establish the offence of rape in the present case, the prosecution must prove the following elements beyond a reasonable doubt:

1. On 20 August 2022, the accused penetrated the complainant's mouth with his penis.
2. The complainant did not freely and voluntarily consent to the penetration.
3. The accused knew that the complainant was not consenting.

### **Burden of proof and assessment of the evidence**

[12] The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence.

[13] The accused chose to give evidence, but he does not carry any burden to prove or disprove anything. The burden remains on the prosecution to prove his guilt beyond a reasonable doubt.

[14] The burden is on the prosecution to prove the charges beyond a reasonable doubt. Each element of the charge must be proved but not every fact of the story. If there is a reasonable doubt, so that the Court is not sure of the accused's guilt, or if there is

any hesitation in my mind on any of the elements, the accused must be found not guilty of the charges and, accordingly, acquitted.

### **Approach to the assessment of the evidence**

- [15] I approach the evidence dispassionately, without sympathy or value-laden rules regarding how men and women should conduct themselves. It is entirely a matter for me to decide which witnesses are credible and reliable and which part of their evidence I accept as true.
- [16] The prosecution's case is dependent upon the complainant's evidence. She is 20 years old. Her evidence does not require corroboration.
- [17] The identity of the accused is not in issue in this case and nor is the fact that the accused penetrated the mouth of the complainant with his penis, touched her thigh and vagina over her clothes or that that the complainant touched his penis. The sole issue in respect to counts 1 to 3 is consent. With respect to count 4, the accused denies having touched CH's vagina on 16 March 2023.

### **Prosecution evidence**

- [18] There are a number of admitted facts. The identity of the accused is admitted as is the age of 'CH' at the time of the alleged offending. Further, the accused and the complainant have an uncle and niece relationship and the accused was at both of the locations (on 20 August 2022 and on 16 March 2023) that are the subject of the charges. With respect to the alleged offence on 16 March 2023, it is also admitted that the accused's wife greeted the complainant and another relative that evening at 9.30 '*and went to sleep, whilst [the accused], another uncle, and [the complainant] were sitting*'.
- [19] A number of documents are admitted by consent, including the complainant's birth certificate, a disc of an audio recorded conversation between the accused and the complainant that has been transcribed in Hindi (the language spoken during the conversation) and translated into the English language. According to the evidence of

the complainant she made the recording. The conversation was referred to by both the complainant and the accused in their evidence at trial.

[20] The prosecution called two witnesses being the complainant (PW1) and her uncle (PW2<sup>2</sup>).

[21] CH's evidence in examination in chief was as follows:

- i. CH is now 20 years old. The accused is her uncle who she has known since birth.<sup>3</sup> Her family and the accused's family are very close. She considers the accused's wife to be like a second mother.
- ii. On 20 August 2022, there was a family lunch at her mother's house in Tamavua. CH was then 17 years old. At some point between 4 and 5pm the accused's wife asked the accused to go and pick up their daughter who was working in town. CH stated that the accused *'was walking out of the door, and he turned and he was like, do you want to come along? He said that to me, so I said without hesitation, I was like, yes, I will come with you because I get to see my cousin [DW3], who I'm very close with'*. The accused drove the car while CH sat in the front passenger seat.
- iii. On the drive, CH noticed that the accused had taken a long route. The accused then began asking inappropriate questions such as whether CH had had sex before, CH's favourite sexual position and whether CH had smoked marijuana. CH felt uncomfortable. She stated that her uncle had not previously asked these sorts of questions. CH stated that *'we had reached town and we were making our way up to Motiram, Toorak side, and that's when he started rubbing on my thigh and touching my private part. And from then on, I just went blank, and when we got to Nehru [Primary School], he rolled up his windows, he locked the car, and then he asked me to suck on his penis, and he was quite persistent. And at that moment, I was just scared. My only fear was that if I were to get raped, I did not want that at all. So at the end, I caved and I just wanted to get*

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<sup>2</sup> I have deliberately not named PW2 to protect the identity of the Complainant.

<sup>3</sup> The accused is related to CH by marriage, the accused's wife is the cousin of CH's mother.

*it over and done with. So he put my hand there on his penis to make it hard, and then he made me suck on it until he ejaculated*'. CH was asked by the prosecutor to provide more details. She stated that that the accused put his hand to the back of her head pulled her head towards his groin and made her suck his penis until he ejaculated in her mouth. She stated that she did not consent to any of this - the rubbing or the sucking of his penis. She also stated that he pulled his pants slightly down. She reiterated that she did not like the feeling and simply wanted the matter over and felt disgusted with her uncle for having made her do it. Further, that *'I felt extremely uncomfortable, because I never thought that he would do that, and like I said, I had blanked out as soon as that happened, like I had no thought process when he started doing that'*. When asked whether she consented to these acts CH stated, *'Absolutely not. I didn't'*.

- iv. CH stated, *'After that, [the accused's daughter] had rang his phone asking, are you coming? He said in Hindi, she said in Hindi, ah, sorry, he replied back like, ha, ha mata, ha mata, like I'm coming. And then we, we took off again and we had stopped at a shop in Samabula, I don't know the name of it. And then he bought me a packet of cigarettes and he threw it at me when he got back in the car. And he's like, make sure you don't tell anyone what happened. And I just kept quiet. I didn't say anything. I just, I was just silent the whole car ride'*.
- v. CH was asked why she did not try to escape, answering *'Again, I was scared of him doing something to me. And also, I, at that point, I just wanted to do whatever I could just to get home and feel safe'*. She stated that when they returned to her home she did not tell anyone as she was scared. When asked why she stated, *'Because as soon as I walked through that door, I noticed how well my families were getting along. And they've had, like, a really long relationship. And I just felt like me saying something would just break it completely. And I did not want that for my family. That is why I kept it for so long'*. She stated that the events on 20 August 2022 came to light because of a second incident on 16 March 2023.



- vi. On 16 March 2023, she and another uncle, PW2 (the brother of CH's mother) went to the accused's house. PW2 wished to drink yaqona at the house. They arrived about 9.30pm. CH stated that she spent time with her cousins (the accused's son and daughter) and after they went to sleep she went into the kitchen. As she was washing her hands the accused came up behind her and touched *'my inner thigh and my vagina and I pushed him away and then I went straight outside and I told my uncle [PW2]. I was like, can we go home? Like I just want to go home, please and after that, I was on my way back home with my uncle [PW2]. And I felt like I had to tell him otherwise this would keep repeating itself'*. PW2 suggested to CH that she report the matter to the police. CH also stated that she told PW2 of phone calls she had received from the accused. When asked to elaborate, CH stated that the accused managed to get hold of her phone number and called her about three times. She recorded a call. CH stated, *'I had recorded it but the second one was that I was about to go for my maths classes and I was home alone at the time. Mom was out. This is like a Saturday or Sunday afternoon. He was like, can we do it again? Can we do it again? Can you let me know when your mom's not home or? Like do you want me to take you to your to your classes or'*. When asked about her reaction, CH stated, *'I was still kind of scared. I Mean, I didn't say like no like, you know, stop. I was like, I just felt uncomfortable so I was like making excuses in my head. I was like, oh no, like I have to do this do that just to get away from having to see him'*.
- vii. CH stated that her relationship with her mother was good and that the reason that she told her uncle, PW2, was because *'We were getting close and I felt like he was one of like a person I could like trust and feel safe around so I told him'*.

[22] In cross-examination, CH stated:

- i. She denied that it was her idea to accompany the accused in the car to pick up the accused's daughter on 20 August 2022. She denied that it was her idea to stop at the school and denied that it was her that proposed sucking the accused's penis in exchange for the accused purchasing cigarettes for her.

- ii. It was put to CH that it would have been difficult physically for the accused to have forced her to suck his penis given the distance between the front seats and the gearbox being between them. She denied this. She accepted that she could have opened the door and run away but did not. She agreed that when the accused drove from the school to pick up his daughter CH could have run from the car but she said that she was too scared, wished to get home safely and she did not want to escalate the problem.
- iii. She stated that the accused's daughter sat in the back seat and she remained in the front seat. CH denied that she and the accused's daughter were joking and laughing in the car. CH stated that she was largely quiet. She accepted she did not tell the daughter of the incident
- iv. CH stated that she loved her mother most in the world yet did not inform her of the incident when she returned. Her grandmother was also present yet she did not tell her either. CH stated that PW2 was not at the family lunch on 20 August 2022. CH explained that she '*prioritized my family's happiness over how I felt.*' It was put to CH that she did not inform anyone of the matter because she had consented to doing the acts. She denied this.
- v. CH agreed that she did not report the matter to the police until 21 March 2023.
- vi. CH was asked about phone conversations with the accused between 20 August 2022 and 16 March 2023. She stated:

*...He [the accused] called after the first incident on the 20th. The first time he ever made a phone call was two months after. And I think that was in October, and I think the second phone call was in December. After that, I think there was three calls in total, but I could only recall just those two<sup>4</sup>. And then after that, I had blocked his number.*

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<sup>4</sup> A transcript of the recorded call has been admitted by consent along with the audio recording.

- vii. She confirmed that the accused had told CH during the phone call that he wished to do the same thing again and that she replied that she would think about it. CH also accepted that she had visited the accused's house a few times after 20 August 2022, including attending a birthday party for her grandmother at the accused's house. It was put to CH that this was inconsistent with her evidence that she had distanced herself from the accused after the first incident. CH stated:

*I would I would regularly like probably almost every other weekend. But after that incident whenever my grandmother would ask me to go over to their house I would just make up an excuse or not go unless there was a big event where everyone is going than I would go.*

- viii. In relation to the second incident on 16 March 2023, CH explained the circumstances about going to the accused's house that night. She stated:

*...I asked him [PW2] if we could go and eat something. So then when we were driving, [the accused] told him to come. I didn't know that this would occur, but then my uncle told me, can we go and have a few, like can we go grog there? And he was like, it won't be that long, just like one basin, and that's it. And I was like, okay, sure, I can hang out with my cousins, [the accused's two children].*

- ix. CH denied drinking yaqona at the accused's house but did accept that she went into the kitchen to wash her hands. She did not recall the accused's wife being in the sitting room at that time. She denied that the accused had come into the kitchen in order to wash the yaqona basin stating that the accused and PW2 were still drinking yaqona. Nor did she accept that when the accused came into the kitchen she asked for money to buy cigarettes. CH denied threatening the accused, when he refused to provide any money, with the words '*see what I can do for you*'. It was put to CH that she had been blackmailing the accused into giving her money. She denied this stating that '*he has never given me any money*'.

- x. She agreed that she had a brown belt in karate but had stopped karate at age 13. She accepted that she knew something about self-defense and could have used it at the time of the first incident on 20 August 2022 but did not do so. She stated that she did not because she was scared.
- xi. CH was asked whether she had a best friend to which she replied yes. She was asked whether she told her best friend about the incident on 20 August 2022 to which she replied that she had done so several days after the incident. She accepted that she had not informed the police of this, explaining:

*It slipped my mind because I reported a year later. So, I didn't think that through.*

- xii. She reiterated that the events on 20 August 2022 did occur as well as the events on 16 March 2023. With respect to the incident on 16 March 2023, CH stated '*I made my mind up in the car when I was going back home*' that she was going to report the matter. When it was put to her that her claims about the touching on 16 March 2023 were false she stated '*It did happen, that is why it triggered something in me to tell my uncle because I had enough*'.

[23] In re-examination, CH was asked why she told the accused during the recorded phone conversation that she would think about doing it again with him. CH stated:

*Because I was scared of just saying no. I know in my mind I did not want to do it. It's just I hate confrontation. So, I thought of any way to say no, basically, just to get out of it.*

[24] PW2 is the brother of CH's mother. PW2 stated that he has a very good relationship with CH; she is like a daughter and they are very close. He confirmed that he had gone with CH to the accused's house on 16 March 2023 to drink yaqona. PW2 stated:

*...when we went to have grog at Parmesh [the accused] place and all of a sudden my niece [CH] came and told me that she wants to go back home. I told my niece that if we could wait a little bit longer so that we could finish some more bowls*

*of grog before we go. She still insisted that we could go at that time and therefore I told Parmesh that we have to leave because also we have to go for work the next morning. As soon as we left from there, I saw my niece was very depressed, she was worried. And when I asked her, she said that, Uncle, I want to tell you something. At first she asked me not to tell this incident to anyone else. And then I asked her just to tell me what had happened. And she told me that that day when the visitors came to his house, my cousin brother from Australia, Parmesh was going to pick up his daughter...The first incident she told me, is that when there were visitors from Australia...and when Parmesh was going to pick up her daughter from work, that was the first incident which she related to me... 'Parmesh told me, did you have sex? And he said, have you ever done anything like that? Or have you ever been involved in sexual activities with anyone before?' My niece also told me that while having conversation, 'he started touching my thighs. And then he drove me up to Toorak...He locked the door of the car. And then he told me to suck his penis after he locked all the doors...I have no option...and I have to do it'. After the incident, Mr. Parmesh bought a BH switch 10 for her as well. My niece did not tell this incident to anybody...*

[25] PW2 described CH's demeanour at the time she informed PW2 of the incidents as follows:

*She was depressed, worried, like, the way she was telling you. Her facial expression was really frightened. She looked very worried, she looked very depressed.*

[26] In cross-examination, PW2 accepted that the accused was drinking yaqona at PW2's house earlier that evening and about 9pm received a call from his daughter asking him to pick her up. Before leaving, the accused arranged with PW2 to later go to the accused's house to drink yaqona. PW2 and CH subsequently went to the accused's house. It was put to PW2 that the accused's wife was in the sitting room. PW2 stated, 'No, his wife went to sleep. Yes, I can confirm that she went to sleep'. PW2 was pressed on the matter, it being put to him that the wife was in the sitting room when PW2 was

on the verandah. PW2 stated, *'When we reach there, Parmesh wife came, she met with us after that she has left and I do not recall where was she after that'*. It was put to PW2 that CH drank yaqona and smoked cigarettes that night. He stated CH only had one bowl and stated that CH sometimes smoked.

[27] PW2 accepted that CH went to the kitchen and the accused subsequently followed. That all of a sudden CH came out and wanted to leave. It was put to PW2 that CH did not inform PW2 of the reason for suddenly wanting to leave. PW2 responded:

*She relayed to me the kitchen incident when we were on our way, that Parmesh came and he was touching me, and then that's the reason she asked me to leave.*

### **Defence's evidence**

[28] The accused was informed that the Court was satisfied that there was sufficient evidence to establish a prima facie case on the four counts and as such there was a case for him to answer. The accused was informed of his three options; being, the right to give sworn evidence, the right to silence and the right to call witnesses. Mr. Kumar chose to provide sworn evidence as well as call two witnesses.

[29] The accused (DW1) is a taxi driver. His evidence in examination in chief was as follows:

- i. In August 2022, he was living with his wife, his son and daughter, and his mother. He drew a sketch of the house which was produced as Defence Exhibit 1. He confirmed that his family and CH's family were closely related, through CH's mother and the accused's wife. The two families have spent a lot of time together over the years and got on well.
- ii. On 20 August 2022, he and his wife went to CH's mother's house in Tamavua for a late lunch. They left home at 2pm and arrived at about 2.30pm. CH, her mother, her grandmother, PW2 and two others were present. They had lunch about 4pm. CH did not have lunch as she wanted to wait for the accused's daughter in order to eat with her. His wife then told the accused to pick up his

daughter from work at 5.30pm. He asked PW2 if he would like to go for the drive but PW2 declined. As the accused was leaving, CH ran up to the car and said she wished to go. She sat in the front seat. They left at 4.50pm.

- iii. As they were coming down Reservoir Road, CH told the accused that she wished to go to Nehru Primary School to see a friend. When they got to the school, CH started touching the accused's penis with her right hand. The accused stated:

*I moved her hand away, but she still keep on touching and make it hard. And she said, I have done this to plenty boys, don't worry. I won't tell anyone, I tell her that your mother is a lawyer and I don't want to do anything like this. We are very near family. And she said, don't worry, I'll do it and I'll suck your penis and you give me one switch 10 cigarette.*

...

*I took her hand and she again touched it and she put my hand on her lap. And she was touching and she took out her seat belt and turned down on the seat. She turned and I was wearing a tight pants. And she removed my pants and she started sucking my penis. And after that, she took a bottle of water, my drinking bottle of water, near the handbrake. She opened the door, she gurgle there and she said, give me one packet of cigarette. Otherwise, I will go and tell all the families what you have done. But she did it in her consent. I haven't forced her to do it. She did it in her consent.*

- iv. The accused stated that he ejaculated in CH's mouth. After she gargled the water CH told him to drive so that he could buy her some cigarettes. She told him to go to a shop where they sell the cigarettes. The accused stated:

*Mr. Yunus: When CH was touching your penis, did you touch her vagina?*

*Mr. Kumar: No, I didn't touch her vagina. She put my, forced my hand to touch her lap. She, and put my hand on her lap.*

*Mr. Yunus: It was on top of her clothes or inside?*

*Mr. Kumar: On top of her clothes.*

...

*Mr. Yunus: How much is the cost of that cigarette?*

*Mr. Kumar: Ten dollars.*

*Mr. Yunus: Did you buy the cigarette that day?*

*Mr. Kumar: Yes, I went there because she threatened me. If I won't give the cigarette to her, she will go and tell everyone what I have done. Then I was afraid also, then I went and gave her the packet of switch 10 and without my consent she put my hand on her lap.*

- v. They then went and picked up the accused's daughter in town. When his daughter got into the car, his daughter and CH were joking together. They then drove back to CH's house.
- vi. When they arrived back at the house, everyone was still there. At about 8pm, the accused left with his wife and daughter.
- vii. The accused was then asked questions about the evening of 16 March 2023. He stated that his daughter had a work meeting that night. He went to PW2's house to drink yaqona in order to wait until his daughter finished the meeting. CH was at PW2's house and she was also drinking yaqona. His daughter finally arrived about 9pm. Before the accused took his daughter home, PW2 and CH told the accused they wanted to drink more yaqona and asked him for money to buy the yaqona. The accused stated:

*And they said they don't have money to buy that grog. And they asked me, CH asked me \$8 money to give it to her to buy that grog. When I came down, my daughter sit down in the car, I also sit down in my car. Then CH came and asked me \$8. Then I gave her \$8. Then CH told me you go and buy one packet of cigarettes. And then I went back home and my daughter asked me, why are you giving \$8.00 to CH? And I told my daughter that they want to drink more grog and they don't have money to buy it. Then I gave the money to CH. She went, she came in PW2's taxi to my home, I reached my home at 9.30.*

- viii. When PW2 and CH arrived at the accused's house, the accused's wife greeted them both. His wife then went into the sitting room whilst the accused prepared



the yagona. He marked on the sketch of his house where he, CH and PW2 were sitting on the verandah.

ix. They finished drinking yaqona about at 11.10pm. He stated:

*Mr. Yunus: And what happened when you finished the grog?*

*Mr. Kumar: When we finished the grog CH went inside my kitchen to wash her face and her hands.*

*Mr. Yunus: And how do you know that CH went inside the kitchen to wash her face and hands?*

*Mr. Kumar: Because PW2 was lighting a cigarette and giving to CH to smoke the cigarette. She didn't want her mouth to smell like a cigarette. And my wife already saw her drinking grog and smoking. And she persuaded my wife not to tell [CH's mother] that she was drinking grog and cigarette.*

*Mr. Yunus: When CH was in the kitchen, what happened?*

*Mr. Kumar: When the grog was finished, she was in the kitchen, she was waiting for me to come there. I took the basin to put it in the kitchen. And she whispered to me to give her ten dollars to buy a cigarette. And my mother and my wife were sitting down in the sitting room. The door was open, only the sitting room light was off, but the kitchen light was on. My mother and my wife were watching me. And I told CH that I have already bought a grog and a cigarette. I don't have money to buy it. I don't have any money to give you now. And what she said, she said, OK, I'll see what I'm going to do to you.*

*Mr. Yunus: And how loudly was she speaking to you?*

*Mr. Kumar: Just whispering it.*

*Mr. Yunus: And after saying, see what I will do to you, what did she do?*

*Mr. Kumar: Then she went outside. She said to my wife, OK, I'm going. And she went outside because the grog was finished. And she said to PW2 come, we'll go home. And then went in the car. And after that, I don't know about what she said.*

- x. The accused stated that on 20 August 2022, CH gave him her mobile phone number and that he made two calls to her between 20 August 2022 and 16 March 2023. He also sometimes met CH in town. He stated that CH asked for \$10 and threatened him. The accused referred to a particular conversation where he asked CH whether she wished to do the same thing again and she said that she would think about it – this is the conversation that CH recorded and the transcript has been produced by consent of both parties.
- xi. Between 20 August 2022 and 16 March 2023 CH came over to his house ‘*plenty of times*’, including on CH’s grandmother’s birthday.
- xii. The accused stated that he had only told his wife of the incident - it is unclear when the accused first told his wife. He stated that he has a number of health conditions, including a heart problem, asthma and diabetes. He is taking medications.
- xiii. The accused stated that CH’s family and his family have not been talking to each other since CH reported the matter to the police.

[30] In cross-examination, the accused stated:

- i. He confirmed that there were previously no issues between his family and the CH’s family. CH was close to his wife and considered the accused a father figure.
- ii. It was put to the accused that he could have stopped CH from sucking his penis if he wished to. His evidence on this was as follows:

*Ms. Bibi: I suggest to you that you could have stopped CH from doing what she was doing with your age and your relationship with her.*

*Mr. Kumar: I stopped her, but she kept on doing it. She only wanted one packet of cigarettes. She told me she was very addicted to cigarettes, and that's why she did this to plenty of boys. And she told me, don't worry, I won't tell anyone.*

...

*Ms. Bibi: ...I suggest to you, Mr Kumar, that it was not CH who had initiated in touching your penis, but it was you who had taken her hand and made her touch your penis to make it hard.*

*Mr. Kumar: No. She did it herself in her consent.*

*Ms. Bibi: In a yes or no question, Mr Parmesh.*

*Mr. Kumar: No.*

*Ms. Bibi: I further suggest to you that on the 20th of August, 2022, it was you who had unlawfully and indecently touched her thighs and vagina from over her clothes.*

*Mr. Kumar: No.*

*Ms. Bibi: And this was done without CH consent by you.*

*Mr. Kumar: It was done in CH's consent. She took my hand and she put it on her thigh. And she was holding my penis to make it hard.*

*Ms. Bibi: Further, Mr Parmesh, I suggest to you that it was you who had penetrated her mouth with your penis without her consent.*

*Mr. Kumar: That's not true. She did it herself in her consent.*

*Ms. Bibi: Now, Mr Kumar, after CH, like you're saying that it was her doing it, isn't it correct that you could have asked CH to get out of the car instantly?*

*Mr. Kumar: I was.*

*Ms. Bibi: Yes.*

*Mr. Kumar: When I was moving her hand away she kept on doing it, she said she has done it to plenty of boys. And she told me, don't worry, just give me the packet of cigarettes. But after that, she opened my trousers. When my penis was hard, she came and started sucking it. And I was helpless. I couldn't do anything. When she finished, she took a bottle of water, she gurgled. After that, we went and she told me which shop to go and buy the cigarette.*

iii. The accused was adamant that he did not wish for the acts to occur and that CH forced him to do them despite his efforts to stop her.

- iv. He stated that on 20 August 2022 he did not inform his daughter of the incident or anybody at CH's house that day, nor did he disclose it to his wife when they got home.
- v. The accused was asked about the phone calls with CH. He stated, '*she was, every time, she calls me with some other numbers, to call her on that numbers she has given me, and she was blackmailing me, every time. Blackmailing me for money only*'.
- vi. With respect to the events on 16 March 2023, it was put to the accused that his wife went to sleep after greeting CH and PW2.<sup>5</sup> The accused stated that his wife had gone to sleep, but '*and she saw [CH] smoking in the porch, [PW2] giving her cigarette to smoke, and she was also drinking grog, and my wife and my mother were sitting in the sitting room. My wife was with the phone, on the Facebook*'.
- vii. The allegations by CH were put to the accused and he denied them.

[31] In re-examination, the accused was asked why he did not disclose the incident when they returned to CH's house at about on 20 August 2022. He stated that the two families were close and there would have been a '*big fight*' (argument).

[32] The accused's wife, DW2, then gave evidence. With respect to the events on 20 August 2022, DW2 confirmed much the same as her husband, namely, they went to CH's mother's house that afternoon for a late lunch, there were a number of family members present including CH, her mother and PW2. DW2 asked the accused to pick up their daughter from town at 5.30pm and he left to do so at about 5pm. DW2 was unaware that CH had gone with her husband and had asked CH's mother where CH was but could not find her around the house. The accused arrived back at 6pm with their daughter and CH. CH and her daughter then had lunch. DW2 described CH's behavior on her return as '*usual, she was joking with us normally every time she was like that. She was very open with us in conversation and she was still the same. While we were*

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<sup>5</sup> The Admitted Facts signed by the accused on 31 August 2023 read: *Parmesh's wife...had greeted [CH and PW2] on 16<sup>th</sup> March 2023 at around 9.30pm and went to sleep, whilst Parmesh, [PW2 and CH] were sitting.'*

*watching TV, [CH] prepared tea for us and [CH] also prepared fruit salad for us*'. DW2 left to return home with her family about 8pm.

[33] DW2 turned to the events on 16 March 2023, and again her evidence was in line with the evidence from her husband. She stated that their daughter had a work meeting and that her husband had gone to drink yaqona at PW2's house. Her husband and daughter returned home at 9.30pm and shortly thereafter CH and PW2 arrived. DW2's mother-in-law was home and her son was sleeping. This was about 10pm. DW2 was angry that CH was there because CH had school the next day. CH told DW2 that she was sick and would not be going to school and pleaded with DW2 not to tell her mother as her mother would be angry as she did not know any of this. CH, PW2 and the accused then sat on the veranda drinking yaqona. DW2 sat in the living room for a while before going to lie down. She came out later about 11pm and spoke to PW2 about the lateness – PW2 apparently informing her that they would drink two more bowls and then leave.<sup>6</sup> She then sat in the sitting room with her mother-in-law. She saw CH go into the kitchen and her husband follow shortly thereafter with the yaqona basin. She watched them and saw that nothing out of the ordinary happened. CH then left but before leaving, *'she hugged me, kissed me and requested me that I am requesting you again not to inform mom about this. And they left'*. DW2 stated that between 20 August 2022 and 16 March 2023, CH came over a lot and acted in her normal manner.

[34] In cross-examination, DW2 confirmed that her family and CH's family were very close.

[35] The final defence witness was the accused's daughter, DW3. She is now married and living with her husband. She was asked about the events on 20 August 2022. She stated that when her father picked her up from town she got in the back seat as CH was in the front passenger seat. She stated that CH *'was talking normally. She was joking with us normally, as usual'*. When they got to CH's house she and CH had lunch together as the others had already eaten and CH has waited in order to have lunch with DW3 (in line with the evidence from her parents). She described CH's behaviour at the house

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<sup>6</sup> PW2's evidence was that he thought DW2 had gone to sleep after they arrived and when pressed stated he did not recall where she was after DW2 greeted them – this is not consistent with DW2's evidence that she spoke to PW2 before they left.

as follows, *'She was normal. She also prepared fruit salad and served it to everybody. So it was normal'*.

[36] DW3 did not have much to offer regarding the events on 16 March 2023, simply confirming what her parents had already said. She had a work meeting and was taken home by the accused. When she got home, she asked CH whether she wanted to eat but CH did not and, therefore, DW3 ate and went to sleep. Likewise, with respect to the period between 20 August 2022 and 16 March 2023, she described CH's behaviour when she saw her as normal and that at their grandmother's birthday party CH was *'usual, playful, normal'*.

[37] In cross-examination, DW3 accepted that if her father was in trouble she would try to save him but that she had not come to court to save him.

[38] In re-examination, Mr Yunus followed up this line of questioning asking DW3, *'if you knew that your father has done something unlawful, would you come and try to save him today?'* After a lengthy pause, DW3 asked Mr Yunus to repeat the question. The subsequent questions and answers read:

*Mr. Yunus: If you knew that your father has done something unlawful, wrong, would you come to court to save him?*

*Ms. Jyoti: The answer is Yes.*

*Mr. Yunus: Knowing, you would have come to save him, isn't it?*

*Ms. Jyoti: But my father has not done anything unlawful.*

### **Decision and findings on counts 1,2 &3**

[39] The accused is CH's uncle by marriage. The two families have known each other a long time and are very close. CH has known the accused all her life. The accused's wife (DW2) is like a second mother to CH. On 20 August 2022, the accused and his wife attended a family lunch at the home of CH's mother in Tamavua. CH was then 17 years old and still at school. At about 5pm the accused left the house in his car in order to drive to town to pick up his daughter (DW3) from work – his daughter was expecting to be picked up at 5.30pm. CH accompanied the accused, sitting in the front

passenger seat. Along the way, the accused stopped and parked at a primary school. During the drive and whilst parked, the accused touched the complainant's thigh and vagina over the complainant's clothes with his hand. The complainant touched the accused's penis as well as sucked it until he ejaculated in her mouth. The accused then drove to town to pick up his daughter, stopping along the way in order to purchase cigarettes for CH. After picking up his daughter, the accused drove back to CH's house. The accused's family returned to their own home at about 8pm.

[40] These facts are not in dispute. What is in dispute is whether CH consented to the accused touching her thigh and vagina and consented to herself touching and sucking the accused's penis. If not, whether the accused knew that CH was not consenting. In short, with respect to counts 1, 2 and 3 the issue is consent.

[41] The State's case is that CH did not consent and that the accused knew that CH did not consent. Relying on CH's evidence, the State argues that the accused indecently touched CH on her thigh and vagina over her clothes and procured CH to touch his penis as well as penetrated CH's mouth with his penis. The Defense case is that it was instead CH that procured these acts, grabbing the accused's hand to touch her thigh and vagina, and grabbing the accused's penis and sucking it contrary to his wishes. It is the accused's evidence that it was CH that forced herself on him.

[42] The Defense also contend:

- i. The complainant had a motive for bringing these allegations. The Defense claims that the complainant has been blackmailing the accused, threatening to tell their families of the incident on 20 August 2022 unless he gave her money to buy cigarettes.
- ii. A delay of 7 months reporting the matter to PW2 is an unreasonable delay.
- iii. It was not physically possible for the accused to have forced the complainant to suck his penis, given their respective positions in the car.

- iv. The complainant could have escaped at any time but did not do so, both at the time of the alleged rape and whilst driving to pick up the daughter in town.
- v. Relying on the accused's evidence and that of his wife and daughter, they contend that the complainant's behavior and actions immediately following the alleged incident on 20 August 2022 and in the subsequent weeks and months was normal and inconsistent with the allegations by her.

[43] As stated, the issue with respect to the first three counts is consent. Consent is defined at s 206 of the Crimes Act. The provision reads:

*(1) The term “consent” means **consent freely and voluntarily given** by a person with the necessary mental capacity to give the consent, **and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.***

*(2) Without limiting sub-section (1), a person’s consent to an act is not freely and voluntarily given if it is obtained –*

*(a) by force; or*

*(b) by threat or intimidation; or*

*(c) by fear of bodily harm; or*

*(d) by exercise of authority; or*

*(e) by false and fraudulent representations about the nature or purpose of the act; or*

*(f) by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.<sup>7</sup>*

[44] Rajasinghe J provided the following discussion on consent in *State v Sova* [2013] FJHC 443 (23 May 2016):

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<sup>7</sup> My emphasis.



9. The victim must have the freedom to make the choice. It means that she must not be pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely. The consent perhaps may be limited to some sort of sexual or intimate activities but not for another form of sexual activity. The consent can be withdrawn at any time. The Fiji Court of Appeal in **Balemaira v State [2013] FJCA 40; AAU098.2010 (30 May 2013)** found that the consent is an ongoing state of mind and is not irrevocable once given.

10. Sexual Intercourse is normally a mutually agreed recreational and pleasurable act of two persons. Accordingly, the consent for sexual intercourse must be comfortable to the person who made such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.

11. The issue of the existence of consent for an alleged sexual intercourse that took place in private between two persons is always involving with believing of the version of a person against another's. Hence, in order to determine whether the victim gave the consent, it is important to consider how the victim and the accused behave before and after the alleged sexual intercourse.

12. Lord Lane CJ in **R v Pigg [1982] 2 All ER 591** has discussed the issue of recklessness and the mistaken but honest belief of the accused person that the victim was consenting, where his lordship held that;

*“so far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk she was not or he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not.*

- [45] Two competing versions have been provided by the accused and the complainant. If I accept the accused's version then the complainant did consent to the assaults and the accused is not guilty of counts 1 to 3. Even if I reject the accused's evidence, the State must still prove beyond reasonable doubt that the complainant did not consent and that the accused knew that the complainant did not consent.
- [46] I keep in mind the following factors when determining the credibility and reliability of a witness such as: promptness, spontaneity, probability, improbability, consistency, inconsistency, contradictions, omissions, interestedness, disinterestedness, bias, and the demeanour and deportment in court - see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022).
- [47] It is convenient to deal with the accused's evidence first. I found the accused's version of the events on 20 August 2022 to be fanciful and convenient. The accused would have this Court believe that his 17-year-old niece forced herself upon him and compelled him, despite his physical and verbal resistance, to penetrate her mouth with his penis. Further that she proceeded over the subsequent months to blackmail him into providing money to feed her cigarette addiction. And, when on 16 March 2023 he finally refused to provide \$10 to buy more cigarettes CH was prepared to harm the happiness of two families and the potential liberty of her uncle out of revenge. I found the accused's evidence and his explanations to be unconvincing.
- [48] The accused relied on supporting evidence from his wife and daughter to show that the complainant's behavior immediately after the first incident and in the subsequent weeks and months was normal, and out of character for a person who has been sexually assaulted. There is no normal behaviour for a victim of sexual offending, each victim will react differently. In any event, I found that the similarity of the evidence between the three Defence witnesses to be striking, so much so that it appeared that their evidence was scripted. It was evident listening to the accused and his wife that they attempted to paint a very unfavourable picture of their niece - that she smoked and drank yaqona, disobeyed her mother and stayed up late on school nights. On the other hand, CH described the accused's wife as a second mother and with the exception of the accused's conduct that is the subject of this proceeding did

not have an unkind word to say about him or DW3. I found DW2's evidence to be unsatisfactory. Like the accused, DW2's evidence was self-serving (to support her husband). She was critical of the complainant's behaviour and conveniently happened to go looking for CH on 20 August 2022 and be conveniently positioned on the night of 16 March 2023 to view the accused and the complainant in the kitchen. I find it unrealistic that even if she was in the sitting room at the material time on 16 March 2023 that she would have had her eyes on the accused and the complainant the entire time they were in the kitchen.

[49] The Defence has raised a motive on the part of the Complainant, being blackmail. I have, therefore, directed my mind to the Jovanovic direction to remind myself that an accused has no burden to prove a motive or prove a reason for a complainant to lie. The Court of Appeal in *Rokocika v State* [2023] FJCA 251 (29 November 2023) stated at 32 to 34:

*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].*

[50] The Defence argue that the complainant was blackmailing the accused to obtain money to pay for cigarettes. The complainant denied that she received any money from the accused. It does not appear she was asked during her evidence about any smoking habit. In any event, the audio recording of a conversation she had with the accused during the period in question contradicts the accused. The complainant stated ‘*I don’t smoke anymore*’ when the accused offered to buy her cigarettes.

[51] The transcript of the audio record of the phone conversation between the accused and the complainant, recorded by the complainant, undermines the accused’s version of the events on 20 August 2022. The first transcript reads:<sup>8</sup>

*Accused: Save this number.*

*Complainant: Okay.*

*Accused: When will he get switch cigarette.*

*Complainant: Not now, I don't smoke anymore.*

*Accused: Okay me, **I want to do it again.***

*Accused: Who me.*

*Accused: **You tell me the day.***

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<sup>8</sup> The conversation was in Hindi and has been translated into the English language.

*Complainant: I can't, I have school and stuff.*

*Accused: No. Once the flu is right then*

*Complainant: Okay. I'll let you know.*

*Accused: Once [mother] is not at home, you tell me then I will come.*

*Complainant: Okay, right.*

*Accused: Okay?*

*Complainant: Yes.*

*Accused: Tomorrow you going to school?*

*Complainant: Yeah, I'm going to school.*

*Accused: And what about after school?*

*Complainant: I'll see.*

*Accused: Then you call me I will come with the switch cigarette if you want them.*

*Complainant: Right bye.*

*Accused: Right?*

*Complainant. Yes. Bye.*

*Accused: Okay bye. Save this number of mine, Call me and tell me.*

*Complainant: Yes. Bye.*

*Accused: Okay right bye.*

*Complainant: Fuck''<sup>9</sup>*

[52] The second transcript reads:

*Complainant: Next week.*

*Accused: Okay, then next week right?*

*Complainant: Ehh.*

*Accused: After exam, okay?*

*Complainant: I'll see.*

*Accused: No promise, you have promised me.*

*Complainant: Okay okay yeah sure.*

*Accused: Okay?*

*Complainant. Yeah. Next line.*

*Accused: And what do you want, what shall I buy, tell me.*

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<sup>9</sup> My emphasis.

*Complainant: No nothing, nothing.*

*Accused: Okay.*

*Complainant: Yeah.*

*Accused: Then you tell me which day then?*

*Complainant: I'll see first and then let you know.*

*Accused: So you are not calling me, not even telling me.*

*Complainant: Yes because I have exams, I have to concentrate on exams.*

*Accused: Okay.*

*Complainant: Yeah.*

*Accused: Okay.*

*Complainant: Right.*

*Accused: Okay.*

*Complainant: Right.*

*Accused: Okay then I will call you again.*

*Complainant: Yeah bye.*

*Accused: Okay. Right.<sup>10</sup>*

[53] It is clear that it is the accused pressuring the complainant to ‘do it’ again looking for any opportunity; after school, at home when her mother is not home and so on. There is no indication that CH is blackmailing the accused for money and, in fact, it is the accused who is offering to give CH gifts yet she declines to accept them.

[54] I, therefore, do not accept the accused’s evidence or that of DW2 – DW3 offered no material evidence that has assisted the Court. However, simply because I reject the accused’s evidence does not mean that he is guilty of the offences. The State carries the burden of proving the offences. I, therefore, turn to consider the complainant’s evidence.

[55] I have had the opportunity to observe the evidence of the complainant as well as read the transcript of the evidence and transcript of her phone call with the accused. I found the complainant to be a straightforward and honest witness. She listened to the questions and thought carefully about her answers. She made concessions in cross

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<sup>10</sup> My emphasis.

examination, such as that she could have escaped by running from the car and that she could have told her mother or others of the assaults when she returned home on 20 August 2022. Further, that she knew self-defence, and karate, and could have defended herself. Her explanations for not having done so were reasonable and understandable. She froze. She was a 17 year old teenager in the company of an uncle she had known all her life. She would not have expected him to betray her. She stated that she was too scared to run because she was scared that he would rape her. Again, this explanation is reasonable. I am satisfied that the complainant's evidence is truthful. Her explanation for not reporting the accused's conduct to her mother or other family members on 20 August 2022 is also reasonable. Their families were very close and it would have destroyed this relationship – which indeed did occur when she finally reported the matter in March 2023. The fact of the close relationship – accepted by the accused and his two witnesses - is also a reason why it is difficult to accept the accused's assertion that the complainant would fabricate a false allegation over his refusal to give her \$10.

[56] The importance of PW2's evidence pertains to the recent complaint rule – he was the first person that CH complained to about the accused's conduct.<sup>11</sup> This evidence does not corroborate CH's evidence but the consistency of the timing of the complaint lends weight to CH's credibility. As the Court of Appeal noted in *Kumar v State* [2018] FJCA 65:

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

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

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<sup>11</sup> Although the complainant did state in cross examination that she reported the matter to her friend several days after the first incident.

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

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

[56] *The legal position on recent complaint evidence was stated in **Raj v. State** CAV0003 of 2014: 20 August 2014] FJSC 12  
*In any case evidence of recent complaint was never capable of corroborating the complainant's account: **R v. Whitehead** (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: **Basant Singh & Others v. The State** Crim. App.12 of 1989; Jones v The Queen [1997] HCA 12; (1997) 191 CLR 439; **Vasu v. The State** Crim. App. AAU0011/2006S. 24<sup>th</sup> November 2006.**

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

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

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

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

[57] It is for this Court to decide whether the evidence of recent complaint assists in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is a matter for this Court to decide whether it accepts the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it. The complaint was made to PW2 more than



seven months after the first incident but immediately after the second incident. It is, therefore, close in time to the second incident but not to the first incident. The Defence is critical of the delay, contending that it undermines the recent complaint principle.

[58] Each individual will respond and react differently to a sexual assault. CH explained that when she got home on 20 August 2022 after the assault she saw how close the two families were and did not wish to destroy that – she prioritized her families happiness over her own feelings. She decided to report the matter after the second incident because she realized the assaults would continue unless she did something. I accept this explanation. It is reasonable and consistent not only with the transcript of the phone conversation with the accused wherein he pressured CH to do it again but the assault in the accused’s kitchen on 16 March 2023.

[59] Accordingly, I accept the complainant’s version of the events on 20 August 2022 as being correct. The question that arises is whether I am sure on this version that CH did not consent to the assaults and that the accused knew the complainant was not consenting.

[60] The complainant stated:

- As they were driving, the accused rubbed her thigh and touched her private part. She *‘just went blank’*.
- When they got to the primary school, he rolled up the windows and locked the car. He then *‘asked me to suck on his penis, and he was quite persistent. And at that moment, I was just scared. My only fear was that if I were to get raped, I did not want that at all. So at the end, I caved and I just wanted to get it over and done with. So he put my hand there on his penis to make it hard, and then he made me suck on it until he ejaculated’*.
- And, *‘parked outside of Nehru Primary School and then told me to do it’*; *‘I felt disgusted that my uncle would make me do that’*; *‘I was scared of him’*

*doing something to me. And also I, at that point, I just wanted to do whatever I could just to get home and feel safe’.*

- In cross examination, CH stated:

*CH: ...he just grabbed me like this and just. He didn't like fully force me. I just wanted to get out of that situation. So was a bit hesitant but then he still pushed my head forward.*

*Mr Yunus: So you are consenting isn't it?*

*CH: No, I wasn't, I just had to.*

[61] On CH's evidence, she did not say that she said 'no' to the accused or physically resisted the accused. She stated that she went blank and froze. CH nevertheless made it clear to the Court that she was not consenting to the assaults on her. She did not agree to the assaults and feared for her safety. It is clear from the accused's actions as they were driving and when he parked, that the accused was indifferent to whether CH was consenting. He made his intentions clear when he placed his hand on CH's thigh and vagina while driving and when he locked the car after parking it. He intended to sexually assault CH. CH was not given any real choice to freely provide her consent. Her vulnerability was heightened by the fact that the accused was in a position of authority as her uncle. The accused pressured CH into complying - she did not freely consent. The accused will have known that this was so. He subsequently sought to buy her silence by purchasing cigarettes.

[62] I, therefore, find that the complainant did not consent to the acts and that they were forced upon her. The accused did not care whether the complainant was consenting or not.

#### **Decision and findings on count 4**

[63] The common ground between the parties in respect to the allegations pertaining to count 4 is that PW2 and CH were at the accused's house on the evening of 16 March 2023. Further that CH and the accused were both in the kitchen shortly before CH and PW2 left the house.

[64] CH claims that the accused touched her vagina while in the kitchen. The accused denies this claiming that he had gone into the kitchen to wash the yaqona basin. The accused's wife corroborates his evidence stating that she observed CH and the accused in the kitchen at the material time. As stated, I found CH to be an honest and reliable witness. I am satisfied that she told the truth and that she was assaulted by the accused on 16 March 2023.

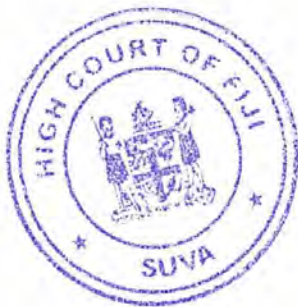
[65] I am also satisfied that PW2 was an honest and truthful witness. His evidence is consistent with CH in respect to the events that night. For example, both stated that PW2 and the accused were still drinking yaqona when CH went into the kitchen. There was no reason for the accused to go to the kitchen to wash the yaqona basin at that time – contrary to the evidence of both the accused and DW2. DW2 says that she spoke to PW2 when DW2 came back to the sitting room at 11pm and spoke to CH when CH left but neither prosecution witness mentioned seeing DW2 at that time. It was evident that DW2 had tailored her evidence to support her husband. She sought to portray the complainant in a poor light in order to support her husband's narrative that CH was blackmailing him.


[66] I am satisfied that the accused touched the complainant's vagina on the outside of her clothing without her consent knowing that CH did not consent. The assault was indecent and unlawful.

### **Conclusion**

[67] The fact that I do not accept the accused's evidence does not mean that the accused is guilty. The prosecution is not relieved of its burden to prove beyond a reasonable doubt that the offences were committed by the accused. Having listened to all the evidence carefully I am sure that the complainant's evidence correctly sets out what happened to her on 20 August 2022 and 16 March 2023. Her complaint to PW2 is consistent with the complainant's evidence as is the transcript of the phone call between the accused and CH.

- [68] I accept the evidence of the complainant as truthful and reliable. She gave a clear account of what the accused had done to her. I have no doubt in my mind that she told the truth. The fact that the complainant did not yell when the accused touched her vagina on 16 March 2023 or try to escape from the car on 20 August 2022 when the offending was occurring does not mean that the offending did not occur.
- [69] The Court is satisfied beyond a reasonable doubt that the accused on 20 August 2022 unlawfully and indecently assaulted the complainant by touching her thigh and vagina (over her clothing), sexually assaulted CH by procuring her to touch his penis and raped CH by penetrating her mouth with his penis. Similarly, on 16 March 2023 the accused indecently assaulted CH by touching her vagina over her clothes.
- [70] In view of the above, I find the accused guilty as charged of count 1 of indecent assault contrary to s 212(1) of the Crimes Act, guilty of count 2 of sexual assault contrary to s 210(1)(b)(i) of the Crimes Act, guilty of count 3 of rape contrary to s 207(1) and (2)(c) of the Crimes Act, and guilty of count 4 of indecent assault contrary to s 212(1) of the Crimes Act, and he is, accordingly, convicted.



  
D.K.L Tuiqeregere  
JUDGE

**Solicitors:**

**Office of Director of Public Prosecutions for the State**

**M. Y. Law for the Accused**