

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

Criminal Case No. HAC 355 of 2023

BETWEEN : STATE

AND : SIVNEET PRASAD CHAUDHARI

**Counsel : Ms J Singh for the State
Mr J Reddy for the Accused**

Hearing Dates : 1, 2 & 3 September 2025

Closing Address : 12 September 2025

Judgment : 19 November 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 ‘**RK**’ in this judgment. I have deliberately avoided identifying details that may lead to identifying the complainant.

[2] The accused is charged with the offence of rape. The information reads:

Count 1

Statement of Offence

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

Particulars of Offence

*SIVNEET PRASAD CHAUDHARI on the 14th day of November 2023 at Nasinu in the Central Division, penetrated the vagina of **RK** with his penis, without her consent.*

Rape

- [3] The offence of rape has three elements: the penetration of a complainant's vagina, anus or mouth by the accused with their penis, finger or an object, the complainant not consenting to sexual penetration, and the knowledge of the accused that the complainant was not consenting.
- [4] Pursuant to s 207(2)(a) of the Crimes Act, the offence of rape occurs where a person has carnal knowledge of another person without that person's consent. The slightest penetration is sufficient to establish the element of penetration.
- [5] According to s 206 of the Crimes Act, "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. 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 to be 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 for the court from all the proven facts.
- [6] To establish the offence of rape in the present case, the prosecution must prove the following elements beyond a reasonable doubt:
1. On 14 November 2023, at Suva, in the Central Division, the accused penetrated the vulva or vagina of RK with his penis.

2. RK did not freely and voluntarily consent to the penetration.
3. The accused knew that RK was not consenting.

Burden of proof and assessment of the evidence

- [7] 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. The accused has a right to remain silent and no adverse inference can be drawn if he remains silent.
- [8] The burden is on the prosecution to prove the charges beyond 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.
- [9] 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.

Approach to the assessment of the evidence

- [10] 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.
- [11] If the account given by the accused is or may be true, then he must be found not guilty. But even if the account given by him is entirely rejected, that does not relieve the prosecution of its burden of making sure by evidence of the accused's guilt.

[12] The identity of the accused is not an issue in this case. The complainant alleges that the accused forced himself on her and had carnal knowledge without her consent. The accused states that these events did not occur.

Admitted Facts

[13] There are a number of facts which are agreed by the parties - as contained in the Agreed Facts signed on 15 February 2024.

[14] The accused and RK were in a domestic relationship a short time before the alleged rape. They had been living together and were still staying in the same dwelling at the time of the material events.

[15] On 13 November 2023, it was Diwali. The accused and RK went together to a friend's house to celebrate. Later that night, RK was picked up in a vehicle by a male friend (who I will refer to as 'N'). N later dropped RK at her home at which time RK drank alcohol with the accused. RK then went to her room to sleep on a mattress. The alleged rape is said to have occurred shortly afterwards.

[16] RK lodged a complaint with the police later on the morning of 14 November 2023. The accused was arrested and interviewed on 28 November 2023.

Evidence at trial

[17] The prosecution called three witnesses, being:

- RK, the complainant – PW1.
- Dr Kesaia Tuidraki, medical practitioner – PW2.
- WDC 3723 Reshmi Lata Singh, investigating officer – PW3.

- [18] The accused provided evidence in his own defence.
- [19] The evidence from the prosecution witnesses and the accused is summarized below.
- [20] RK was previously in a relationship with N between 2016 and 2017. She began dating the accused in 2019. According to the accused, this was his first relationship. When RK and the accused began dating each was living with their own parents.
- [21] In about 2022, RK had a falling out with her parents and began looking for a flat to rent. The accused and RK began living together from this time in a two bedroom flat.
- [22] According to RK, her relationship with the accused has not always been smooth. She felt neglected and raised this with the accused from time to time, but things did not improve. As such, on 2 October 2023, RK informed the accused that she was breaking off their relationship. The accused was upset. Nevertheless, they agreed to stay in the same flat, but in separate rooms, until RK could find her own place.
- [23] Around this time, it appears that RK and N were spending a bit of time together, which was causing problems with the accused. It appears that on 11 October 2023, N dropped RK at home at about 11.30pm. When he did so, there was a ‘commotion’ between the accused and N. RK described the commotion as the accused being aggressive. The accused described the commotion as him pleading with N not to interfere with his relationship with RK – evidently, the accused suspected that N was already in a relationship with RK or at least worried that events were moving in that direction. The accused held out the hope that he could win back RK’s affection.
- [24] The accused stated in evidence that during their relationship, when they were living together, the accused performed most of the household chores including cooking as

well as dropping and picking up RK from work. According to the accused this continued after the break-up on 2 October 2023. However, when N came onto the scene N began picking up RK from home in the morning and taking her to work.

[25] It is evident that the accused blames N for the break up with RK. RK sees it differently. The problem was with the accused. N was merely a friend over this period. She did not start dating N until about 17 or 18 November, after the alleged rape. RK is entitled to date who she pleases. However, the accused raises the issue of RK's relationship with N as being the motivation for the allegations against him.

[26] According to RK, she and the accused remained living together in this situation for the next month. They were no longer in a domestic relationship, but simply existing in the same house in two separate bedrooms. They did not tell their parents about their break-up but did inform their friends.

[27] The accused provides a slightly different account of the events from 11 October to 13 November 2023. He states that on 13 October, two days after the commotion with N, RK came home that night a bit drunk. They drank alcohol together. They talked about giving their relationship another chance. They began getting physically intimate but RK then suffered an anxiety attack. The accused stated that RK had a history of anxiety attacks, which he had known about since shortly after their relationship commenced. The accused stated that their friends were also aware of RK's anxiety attacks. He described the symptoms as wheezing, shaking, and crying. The accused stated that on 13 October 2023, once RK began experiencing an anxiety attack, they stopped their intimacy. The accused then went to the kitchen to fetch a glass of water for RK, after which RK calmed down. According to the accused, about a week later RK again informed the accused their relationship was over. RK denies the events of 13 October and denies getting back together with the accused for the short time.

The alleged rape

- [28] The alleged rape occurred in the early hours of 14 November 2023. The previous day was Diwali. The accused and the complainant had still not informed their parents of their breakup. On 13 November, they went together to each of their parents' home to celebrate Diwali. Later that evening they went together to friends' places. At about 11.30pm, RK was picked up by N in his car from one of these places – RK and N went to N's friends to celebrate Diwali. RK stated that she was dropped off by N at her flat about 30 minutes later - shortly after midnight on 14 January 2023.
- [29] The accused's evidence is that after N picked up RK, the accused went home alone. Once home, he began drinking alcohol in the living room. About 10 minutes after he arrived home, the complainant was dropped home.
- [30] When RK arrived home she and the accused drank alcohol together. RK also ate her dinner. It is unclear how long this occurred, although RK described the period drinking as between 2 to 2½ hours. They were cordial, and according to RK there was no aggressive behaviour from the accused. They spoke of the events that night and RK informed the accused of the places that she visited with N.
- [31] RK then went to her room to sleep on a mattress on the floor. The accused followed either immediately or a short time later – depending on whose version is believed.
- [32] According to RK, the accused immediately followed her into the room and asked to sleep on the mattress next to her as he was not feeling emotionally well about their break up. RK told the accused that if it would help him he could stay there for a while. RK stated that the accused kept talking to her about how he was upset that the relationship was ending and made promises to make the relationship work if allowed

another chance. RK was lying on the left side of the mattress facing away from him towards the wall. The accused then leaned towards RK, grabbed her, turning her towards him. She stated, *'He turned me towards him. He made advances at me. He went in to kiss me, which is when I told him to stop and I was tired and I would like to sleep. And that's when I turned away. He continued with the conversation and proceeded to pull me in facing him. And that's when he went in for a kiss. And by this time I was pinned on the mattress on my back'*. RK stated that the accused held onto her arm to turn her towards him. She tried pushing him away with her arm. He held onto her arm and pulled her towards him. RK stated, *'That is when he had gotten up from being in a laying position and he turned me on my back, leaning into the mattress, and that's when he started kissing me on my neck while lifting my dress and pulling my panties down, and his body was heading downwards, ... between my legs'*. RK stated that she then grabbed his hair and pushed his head away from her. She described the events as happening very fast from this point. RK stated that *'there was a no [from RK] when I pushed his head but that was the only thing that came out of my mouth before he proceeded to take off his pants and penetrate me'*. The accused did not speak to RK at all but kept thrusting his penis inside her vagina. The complainant stated that she tried pushing him from the chest and kept telling him not to do it. She stated, *'I told him, no, I don't want this'*. She further stated, *'I tried hitting his chest, trying to get his attention, to have him to stop. And while doing so, I broke into tears and I was sobbing. He stopped. While sobbing, I told him, I did not want this. He knew. I said, he knew that this is something I would never be okay with. And by the time I had stopped crying, he penetrated again'*. RK stated that she used all her strength to push him off, *'And that's when he got up, trying to walk away, saying, okay, since you don't want it. And he went back to the living room'*.

- [33] The accused's evidence is similar to RK up to the time that RK went into the room to sleep. Thereafter, the versions differ markedly. The accused stated that after RK went to the room, he ate his meal. About 20 to 30 minutes later, the accused went into the same room as RK to sleep. In cross-examination, the accused explained the reason for going to sleep in the same room as RK as follows, *'the second room that we had, it was more like a walk-in closet, where we would put all our clothes and just get ready. So that bunk bed, the upper level wasn't accessible, and the lower level*

where the mattress was, [RK] had put all her traditional outfits and her jewelries and other things...The thing is, dating [RK] for the past four years, I realized that moving her things will make small arguments, which I didn't want to happen. I didn't want to move her things aside because she had organized it that way. So I went and decided to just lay next to her and sleep'. The accused stated that RK was already sleeping on the mattress. As he went to lie on the other side of the mattress, he heard RK cry, and, 'As soon as I saw that she started to cry when I turned back I saw her I realized that she's having another anxiety attack with her breathing and her body shaking'. Therefore, he went back to the living room and slept on the sofa.

The next day

- [34] That next morning, the accused states that he left for work early at about 6am. He stated that RK was still asleep. The accused's evidence is that he had two phone conversations with RK that morning. The first, RK phoned to ask why he had not woken her up before he left, as they had planned for him to drop RK at her parents – RK was not asked about this phone call in cross-examination. RK did accept that the second phone conversation occurred. This was about 9am. RK stated in cross examination that she telephoned the accused to ask '*him for his version of what had happened during the night*'. In response to the assertion by defence counsel that the accused had told RK that she had suffered an anxiety attack, RK agreed that the accused had mentioned that. The accused also gave evidence about the conversation. He stated, in examination in chief, that when asked by RK, '*I told her nothing happened and she started to say no, that you forced yourself on me and I am going back to N and then I'll ensure that you go to jail*'.

- [35] There is another matter to mention at this point although the details are sketchy. It appears that over this period, and possibly the day before the alleged rape, the accused had, without the complainant's knowledge, obtained access to her laptop without her knowledge. The accused was searching for RK's communications, convinced that RK was already in a relationship with N. It appears that the accused found some

intimate messages between N and RK. The accused was asked about this in cross-examination. The evidence on this went as follows:

Prosecutor: ...you at one point in time accessed RK's laptop and her messages with N?

Accused: Yes.

Prosecutor: And after accessing these messages with N, you had threatened RK to expose it?

Accused: No, I did not threaten her.

Prosecutor: Then why did you access her messages?

Accused: I just wanted to know the truth behind them, what was happening, because we had already made plans on that day [13 November 2023]. And when I saw that they were intimate messages, I did get upset, but I still had the hope of dating her and getting her back in my life.

[36] At or about 11am on 14 November 2023, RK went to the local police station to report the alleged rape. N accompanied her. The police arranged for a medical assessment which she had later that same day with Dr Tuidraki.¹ Again N accompanied RK to the medical centre. A Fiji Police Medical Examination Form, being Prosecution Exhibit 1, was prepared by the police. Dr Tuidraki completed the medical portion. The assessment commenced at 3.02pm and concluded at 4.01pm. The history given by RK, as recorded in the form, was that, *'She was raped this morning by her ex-boyfriend namely Sivneet Chaudhari...Both were under the influence of alcohol. No loss of consciousness. LMMP 6/11/23. Sexually active female'*. Dr Tuidraki noted that RK was *'calm, nil distress'*. She noted that RK's hymen was not intact and that there were *'visible minor abrasions in the labia minora'*. Dr Tuidraki's opinion was that *'The findings above suggest there are signs of recent injuries - minor abrasions on the labia minora - i.e. fresh'*.

¹ Prosecution Witness 2.

[37] In her evidence at trial, Dr Tuidraki explained the abrasions found on examination. She described the anatomy of the female genitalia, both external and internal. She stated that the abrasions were not normally seen for a sexually active female. These abrasions are normally seen where the female is not aroused, as the lubrication from consensual sexual intercourse normally prevents such abrasions. Dr Tuidraki stated:

...For someone who's sexually active, very unlikely if it's a consented sex. Because in the process, the body is amazing the way it works. It will release fluids that sort of lubricates the area, so this will not cause any of these sort of abrasions if it is someone who is sexually active.

[38] Dr Tuidraki stated that the abrasions were likely less than 72 hours old, as they would not be seen after this period. She further stated, *'I know that she's sexually active because of the history she has given me, and also from the finding of the hymen, and so having the minor abrasions on someone who is sexually active, who's been having sex, is very rare unless and until it's a forced sex'*.

[39] In cross-examination, Dr. Tuidraki again confirmed that the abrasions are caused due to a lack of lubrication at the time of penile penetration (in the event that this activity is the cause of abrasions). She accepted that female lubrication can stop during sexual intercourse particularly if it is prolonged. She also stated that a female's lubrication can vary from female to female, *'females are all different'*. Also, *'there are different stages of when sexual arousal happens'*. She stated that washing the genitalia could cause abrasions if the person is washing harder than usual and has long fingernails. She also accepted that another object, other than a penis, could cause the abrasions – the abrasions being a result of *'blunt force trauma'*. Dr Tuidraki was asked *'When was the last sexual activity prior to this incident?'* She replied that this information was contained *'in the SAE kit form'* that she had collected and had sent to the police forensic department. She did not have a copy of the same.

[40] The accused was arrested on 28 November 2023. Shortly before his arrest, or on the same day, the complainant and accused were involved in a court proceeding in the Nausori Magistrates Court – they were also in dispute over the ownership of a shared car. According to the accused, he obtained a DVRO against RK before his arrest *‘because she kept calling me’*.² In re-examination the accused stated that he went to the Nausori court to obtain the DVRO *‘because [RK] kept harassing me. She kept calling me and messaging me on Snapchat, Instagram and Messenger’*. The purpose of the DVRO, according to the accused, was *‘so that she [RK] stops messaging and calling me because she threatened to go to the police and file another complaint that I have stolen the car...she even threatened to come to my workplace and tell everyone what has happened and she also threatened to post about me on social media’*. While at the Nausori Magistrates Court, the accused received a call from his work colleagues informing him that the police were looking for him. The accused went to the police station and was arrested and interviewed under caution. He was then charged, brought before the Magistrates Court on 30 November and released on bail on 8 December 2023. An interim DVRO was placed against the accused to protect the complainant.

[41] It appears that in January 2024, RK was not in good mental health. According to her evidence, she was suffering suicidal thoughts and reached out to the accused. RK stated in re-examination, *‘My mental state in January [2024] had come to a situation where I was very suicidal. I had been taking therapy, but it was one of those moments where I had taken a break from work. I’m at home, not knowing how to deal with everything. The only person that I used to share emotions with was [the accused] so, I felt that he is the one that can help me’*. RK phoned the accused’s mobile phone on seven occasions on 7 January 2024. The accused did not answer – he would have been in breach of the DVRO if he had done so. RK created an Instagram account under the name *‘jhope4lyfers’* and sent the accused the following message at 2.33pm that same day:

² This is supported by the record of the Magistrates Court, wherein it is noted that an interim DVRO against RK was made on 27 November 2023.

Please let me see you. I promise this isn't a trap. I am really not doing well and I need you. I understand you are very furious with me but please meet me, I beg of you. I need help and honestly I don't know how to handle myself or anything. I am very scared and I don't know what I might do to myself. If there's a way to take my case back, I am willing to do that because this is draining so much energy from me. I really am not doing okay. You know I am violating a code here by reaching out to you. This is how much I need this.

The DVRO can seriously be in your favour after this message since I violated the order, Sivneet, I need help. Please.”

[42] The accused did not respond to the Instagram message - it appears from his evidence that he did not become aware of this message until much later. When RK was cross-examined about this message, initially she could not recall having created the Instagram account or sending the message to the accused. Initially, she only remembered the phone call which she made to the accused the next day. It was only when a copy of the Instagram message was shown to RK that she recalled having done so.

[43] The next day, 8 January 2024, RK again tried phoning the accused on his mobile phone. He did not answer. She then tried calling the accused from the landline at her workplace. This time the accused answered as he did not recognize the phone number. RK was asked about the phone call in cross-examination. She confirmed that she recalled the phone call. She agreed that she burst out crying. She stated that she told the accused about her emotional and mental distress. She described her actions as a ‘*cry of trying to get help, I was looking at the wrong individual for help but I was not doing well emotionally*’. She denied that she had told the accused during this phone call that she had made a false complaint to the police.

Analysis of the evidence

- [44] Many of the facts in this case are not in dispute. The accused and RK were in a four-year relationship up to October 2023. For the last 12 months of their relationship, they lived together in a two-bedroom flat. They were initially in love and intended to get married. At some point, however, RK and the accused began to view their relationship differently. RK became disillusioned by what she perceived as a lack of affection and connection from the accused. The accused appears to have been happy with the relationship. In October 2023, RK broke off the relationship. Because of their financial circumstances they decided to remain in the same flat until RK could find alternative accommodation.
- [45] While RK moved on from the relationship, the accused did not. He still retained hope that they would get back together. RK, however, was spending more time with her friends, including N. The accused felt threatened by N, suspecting that there was something more between N and RK. This led to a commotion on 11 October 2023.
- [46] By 13 and 14 November 2023, when the alleged events occurred, RK and the accused were still living in the same flat albeit no longer in a relationship. They spent Diwali together, celebrating with family and friends. Then at 11.30pm that night, while RK and the accused were visiting friends, N picked up RK and the two spent the last part of the evening visiting N's friends. RK was dropped back home about midnight. The accused was drinking alcohol by himself in the living room. RK joined him. They drank alcohol together and chatted for about 1-2 hours.
- [47] It is the next part of the evening that is in dispute. These are the critical events as they pertain to the charge against the accused. There are two versions of these events. Both agree that RK went to the bedroom to sleep. Both agree that the accused followed, although RK describes this as occurring immediately whereas the accused states that it occurred about 20-30 minutes later. Nothing turns on this difference. It is the next part which is important. RK states that when accused came into the room he tried to kiss her but she rejected his advances. He then grabbed RK, removed her clothes, as well as his own, and forcibly penetrated RK's vagina with his penis. She

tried to resist but was unable. He stopped penetrating her vagina temporarily when she began crying but continued again for a brief time before leaving to go back to the living room.

[48] The accused denies any penile penetration. He states that when he went into the bedroom, RK was sleeping. He intended to sleep on the other side of the mattress but heard RK crying, saw that RK was having an anxiety attack and, thus, returned to the living room to sleep on the sofa.

[49] If I accept RK's evidence then the accused is guilty of rape. On her evidence, the accused penetrated her vagina with his penis without her consent. There can be no doubt on RK's description of the events, that the accused would have been aware that RK did not consent to the penile penetration. If, however, I accept the accused's version then the alleged events did not occur and the accused is not guilty. Even if I reject the accused's evidence, the prosecution must still prove the events occurred. In other words, I must still be satisfied beyond reasonable doubt that RK is telling the truth and that the events as she described occurred in the bedroom in the early hours of 14 November 2023.

[50] Accordingly, the court is required to assess the veracity and reliability of the competing accounts from the accused and RK. 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 of the witness in court - see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomon Qurai* (HC Criminal - HAC 14 of 2022)).

[51] In *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 Brennan J discussed the appropriate approach to be taken where there are conflicting

versions of evidence given by the prosecution and the defence witnesses. Brennan J held that:

*When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is “a gross simplification”.*³

[52] The following comments in *State of UP v M K Anthony* (1985) 1 SCC 505 are also helpful:

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 scrutinize 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

³ My emphasis.

*differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and a refined lawyer.*⁴

- [53] Finally, I am also assisted by the following dicta in *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* (1983) 3 SCC 217:

*A witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen ... **The powers of observation differ from person to person.** What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another It is unrealistic to expect a witness to be a human tape recorder..... **In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation.** And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time sense of individuals, which varies from person to person.... **Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span.** A witness is liable to get confused, or mixed up when interrogated later on...*⁵

- [54] I have carefully considered the evidence of the two key witnesses – being the complainant and the accused. This includes their demeanour, their reactions to questions, any internal inconsistencies as well as any inconsistencies with the other witnesses. I have also carefully read the written transcript of the evidence provided at trial.

⁴ My emphasis.

⁵ My emphasis.

[55] I will deal, firstly, with the accused's evidence. I found that he was a believable witness. He did not embellish or have a tendency to make overstatements. He appeared to think carefully about his answers. He was not defensive in cross-examination; for example, when it was put to him that he kept trying to get back together with RK or that he argued with RK as to why she was going out with N. He conceded that RK had moved on from him while he had not moved on from RK. The accused also accepted that he had improperly obtained access to RK's laptop to look for intimate communications between RK and N.

[56] I turn to RK's evidence. I found her also to be a believable witness. RK provided her evidence in a straightforward manner. Her description of the rape had a ring of truth such that, as I consider the competing versions of the key events from the accused and RK, I prefer RK's evidence. She described the accused as coming into the room seeking emotional support for the break up but then forcing himself on her because she rejected his advances. She was emotional when describing this evidence, crying and requiring time to collect herself. RK made many concessions in cross-examination. She also accepted the description of the accused as being a good man in her life.

[57] It is significant that RK reported the alleged rape to the police only a matter of hours after the event. The timing of RK's complaint is consistent with her evidence that the alleged rape occurred – although, to be clear, the timing does not corroborate her evidence.

[58] The medical evidence is also consistent with RK's version. Dr Tuidraki stated that RK had abrasions to her labia minora – such injuries can be caused by penile penetration where the female is not aroused and will remain visible for up to 72 hours. The medical examination occurred within about 12 hours of the alleged rape. The

fact of the injuries is in line with RK's evidence that the accused penetrated her vagina against her will.⁶

[59] I do not accept the assertion by the defence that there is a material contradiction in RK's evidence regarding the date of the alleged rape. It is recorded in her written police statement as 13 October but it is also recorded in the same sentence as occurring on Diwali. There is no dispute that Diwali was on 13 November 2023. I also note that the history given by RK to Dr Tuidraki on 14 November 2023 was of the alleged rape occurring that morning - as recorded on the police medical examination form.

[60] Nor do I accept the assertion by the defence that RK was confused during her evidence about whether the events on 13 October 2023 occurred (as described by the accused). When the dates and events were clearly put to RK she expressly denied that the events had occurred.

[61] The defence raise a motive on the part of the complainant for making an alleged false complaint to the police; the defence contended that a false complaint was made to the police to remove the accused from RK's and N's life. 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.

⁶ Although, I note that Dr Tuidraki accepted that the injuries are caused by a blunt force and could be caused by an object other than a penis and the medical evidence does not demonstrate that the accused was the cause of the abrasions.

You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about’.

[33] The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:

If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: Jovanovic v R at 523.

[34] NSW Criminal Trial Courts Bench Book also states that:

A motive to lie or to be untruthful, if it is established, may “substantially affect the assessment of the credibility of the witness”: ss 103, 106(2)(a) Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury’s task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: South v R [2007] NSWCCA 117 at [42]; MAJW v R [2009] NSWCCA 255 at [31].

[62] I am satisfied that the alleged motive by RK has no substance. RK and N did not need to remove the accused from their lives. RK had broken off the relationship with the accused and she and N were already spending a lot of time together before the alleged rape. It does not appear they were being discreet with the time they spent together. They did so transparently and in plain sight of the accused and their friends.

[63] In summary then, I prefer RK's version of the critical events over the version of the accused. Further, both the medical evidence and the timing of the complaint to the police are consistent with RK's allegations. Nevertheless, I do have concerns with RK's evidence. These are:

- i. The Instagram message sent by RK to the accused on 7 January 2024. It is difficult to reconcile this communication with the alleged rape. What did RK mean in her message to the accused by the words '*I understand you're very furious with me*'? Did RK mean that the accused will have been furious because of the fact of the complaint to the police or because the complaint was not true - or both? RK also stated, '*If there's a way to take my case back, I am willing to do that because this is draining so much energy from me*'. Was RK willing to withdraw the complaint because it was not true or simply because of the emotional impact on her. RK stated in evidence that she reached out to the accused because she was not mentally well. That is certainly understandable, particularly if she had been raped by her partner of 4 years. However, what is less understandable is why RK reached out to the person who betrayed her and not, say, to her parents, her new partner N, or even a friend. RK not only reached out but persisted over a day to try to connect with the accused – she made 7 calls on 7 January (which were not answered by the accused), another at 5.22am (again not answered) on 8 January and then used a landline to finally make contact.
- ii. The other aspect to the Instagram message which is of concern was RK's initial inability to recall having created the Instagram account or having sent the message to the accused. It was not until the message was shown to RK that she recalled the same.
- iii. The accused denied raping RK and stated in evidence that RK had in fact suffered an anxiety attack at the material time. This is the same explanation the accused offered to RK when she rang him at 9am on 14 November 2023 seeking his version of what had happened. RK accepted in evidence that she

suffered anxiety attacks but stated they only came on after the alleged rape. The accused stated that RK had had anxiety attacks for years and this was common knowledge to their friends. It appears a remarkable co-incidence that the accused designed an explanation that subsequently became a reality for RK. The accused was also mostly correct in his description of RK's anxiety symptoms - RK accepted that her symptoms included issues with breathing and crying (but denied shaking/shivering).

On the evidence presented at trial, I am inclined to accept that RK did have a history of anxiety attacks before the alleged rape. If that is so, then this raises the question why RK has not told the truth about her anxiety condition.

Conclusion

[64] Both key witnesses, RK and the accused, were believable. There were certain aspects of each witness' evidence that I do not accept. With respect to the accused, I do not accept his evidence that he and the accused were intimate on 13 October 2023. Much of his description of that night mirrors the events on 13 November and seems contrived. RK denies the events occurred and will have recalled these events if they occurred. There is no obvious reason for RK to lie about these events as they have no relevance to the events on 13 November 2023. RK also seemed genuinely surprised when these alleged events were put to her.

[65] I also have reservations about the accused's explanation for going to RK's room to lie down in the early hours of 14 November 2023 – he did not wish to move RK's clothes that were placed in the second bedroom. RK's explanation has more of a ring of truth – that the accused told RK that he was feeling upset about their break-up and wanted to sleep next to RK on the mattress.

[66] As for RK, I am not inclined to accept her evidence that her anxiety condition came on after the alleged rape. It is too much of a co-incidence that the accused told RK at

9am on 14 November 2023 that RK had suffered an anxiety attack at the material time and described symptoms that aligned with RK's own description of her anxiety condition.

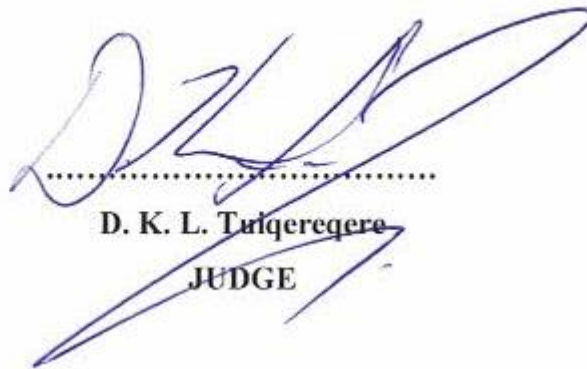
[67] There are two points to emphasize at this juncture. Firstly, simply because I largely reject the accused's version of the critical events is not the end of the matter. The prosecution must still prove that the accused is guilty, the accused is not required to establish his innocence. Secondly, it does not suffice for this court to be satisfied that it is likely that that the accused raped RK. I must be satisfied beyond all reasonable doubt that the rape occurred. While I am satisfied there is a ring of truth to RK's version, it is necessary for this court to scrutinize RK's evidence carefully and thoroughly. Before addressing this, a final point. While I do not accept the defence assertion regarding RK's motivation to lodge a false complaint against the accused, I remind myself that the accused is not required to establish any motivation. It may well be that any real motivation, if such exists, may not be known to any person other than the complainant. It is, therefore, dangerous to search for motivations. Instead, the court must focus on the evidence.

[68] In the final analysis, there are three pieces of evidence that cause me to have doubt about whether the accused raped RK. The first is RK's Instagram message to the accused. The content of the message is difficult to reconcile with the allegation that the accused raped RK. Add to that, the inability, or reluctance, of RK to recall the Instagram message until it was presented to her in evidence. Secondly, the persistent phone calls over 18 hours (from 3.35pm on 7 January 2024 to 8.52am on 8 January 2024) by RK to connect with the accused, the person RK alleges raped her less than 2 months earlier. Thirdly, I come back to RK's anxiety condition which, in my view, RK has not been truthful about and which the accused identifies as the event that did occur in RK's bedroom at the material time.

[69] I must be satisfied beyond reasonable doubt that RK is telling the truth about the alleged rape. For the reasons stated, I am left with a reasonable doubt. I cannot be

sure that RK is being truthful about the allegations against the accused. Accordingly, I am not satisfied beyond a reasonable doubt that the accused committed the offence of rape.

[70] In view of the above, I find the accused not guilty of count one of rape and, as such, he is acquitted.



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D. K. L. Tulqereqere
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State
Jiten Reddy Lawyers for the accused