

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 198 of 2023

STATE

V

FRANK JACK JOHNSON

Counsel: Mr J.M. Rabuku for the State
Mr E.J. Wainiqolo for Defence

Dates of Hearing: : 9, 10 February 2026
Date of Closing Submissions : 16 February 2026
Date of Judgment : 24 February 2026

JUDGMENT

1. The Accused is charged with one count of Rape on the following information filed by the Director of Public Prosecutions (DPP):

Statement of Offence

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

Particulars of Offence

FRANK JACK JOHNSON on the 16th day of September 2023 at Nadi in the Western Division, had carnal knowledge of **MARGERY MELODIE MARY BINGWOR**, without her consent.

2. The Accused pleaded 'not guilty' to the charge. At the ensuing trial, the Prosecution presented the Complainant's evidence and closed its case. At the close of the Prosecution's case, the Accused was put to his defence. Upon his rights in his defence being explained, the Accused elected to give evidence. He also called two witnesses for the defence.
3. At the end of the trial, the Counsel from both sides tendered helpful closing submissions for which I am grateful. Having carefully considered the evidence and the submissions, I now proceed to pronounce my judgment as follows:

Burden of Proof

4. The Prosecution bears the legal burden to prove all the elements of the offence. That burden never shifts to the Defence at any stage of the trial. The Prosecution must discharge the burden of proof beyond a reasonable doubt. The Defence is under no obligation to prove the Accused's innocence or prove anything at all.

Elements of the Offence

5. The Accused is charged with Rape contrary to Section 207 (1) and (2)(a) of the Crimes Act 2009 (Crimes Act). Section 207(2)(a) of the Crimes Act defines the offence of Rape as follows: a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent. In the context of this case, carnal knowledge means vaginal sexual intercourse. The Prosecution alleges that the Accused penetrated the vagina of the Complainant with his penis without her consent.
6. According to Section 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. The

submission without physical resistance by a person to an act of another person shall not alone constitute consent. A consent obtained by force, threat, or intimidation, etc., will not be considered as consent freely and voluntarily given.

7. To establish the fourth element of Rape, the Prosecution must prove that the Accused knew or believed that the Complainant was not consenting or that he was reckless as to whether the Complainant was consenting or not.
8. I shall now summarise the salient parts of the evidence led in this trial.

Evidence for Prosecution

PW1 Margery Melody Mary Bingwor (Margery)- The Complainant

9. Margery is 35 years old. She is married with three girls. She lives with her family in Toorak in Suva. She is named after her mother's sister, Margery, whose son, Frank Jack Johnson (Frank), is the Accused. Frank is her first cousin. He is divorced with a son. At some point in her childhood, she grew up with Frank, who was like a big brother to her.
10. On 15 September 2023 (Friday) afternoon, she came from Suva to Nadi by bus to celebrate her graduation at the invitation of Theresa, her cousin, who resides in Nadi. She was joined by Laura, her niece, at the Suva Bus Stand. Since she could not stay with Theresa, she asked Frank whether she could stay at his place at Jamila Place. She also informed Frank that she was bringing the money (\$400) her husband had borrowed a few weeks back. Frank agreed and suggested that she use part of that money for her bus fare.
11. She arrived at Frank's place around 7 p.m. When they arrived, Frank was drinking beer in the kitchen, making barbecue. She only had orange juice, and after some time, she decided to drink alcohol, because they were celebrating Laisa (Laura's friend) s' birthday. The ladies were drinking Blue Turtle Gin with orange juice.
12. After drinking for a while, Laisa came over to celebrate her birthday. After celebrating the birthday, they went around 10.30 p.m. to Bar-One, Night Club in Martintar, where

the ladies had a jug of Rum and Cola. Frank continued with beer. Laura and Laisa were steady, but at some point, Frank was almost falling off to sleep.

13. From there, they went to another nightclub called Whitehouse and had another two jugs of rum and cola while Frank continued with beer. She was tipsy but was not drunk. They left Whitehouse when it was closed at 1 a.m. and returned to Frank's house. They had a few shots of liqueur while dancing to a song.
14. Frank bought all the drinks at the clubs, and he supplied the drinks at home. She and Frank never joked about sex. He never proposed to have any sexual relationship with her. There were no exchanges between her and Frank, indicating to Frank that there could be some sexual contact. After dancing, the three ladies went out to the porch to smoke. When they came in, Frank had already gone to bed. Around 2 a.m., she was a little drunk and went into the guest room, where she slept while Laura and Laisa slept in the sitting room.
15. When she went to bed, she was wearing an orange T-shirt, blue-and-white shorts, a panty and a bra. She was lying on her back, turning her head to her right. She woke up to a feeling of her body shaking. When she opened her eyes, the first thing she saw was the daylight coming from the window. She could feel something going on inside her vagina as her body was shaking. Her legs were separated, and Frank was in between. She felt his penis in her vagina. Frank was having sex with her. She saw Frank's face on top of her, and his arms were down on the bed beside both her shoulders.
16. First thing she said was, "*What the fuck is wrong with you? Get off me*". Frank immediately got off her. He said to her, "*I thought this was what you wanted*". She swore at him and said, "fuck you".
17. He did not ask for consent to that. Prior to him having sex with her, she did not at any stage indicate to him that she could have sex with him. She saw her panties and her pants on the floor. She swore at him again and walked out of the room to the bathroom to have a shower because she felt disgusted. She was in shock at what had happened, and she started crying. When she came out of the room, she only saw Laura sitting on the couch. Then she went to the room and changed.

18. While she was changing in the room, she heard a knock on the door. It was Frank. He asked if they could talk. She said, "*No, get out. I'm changing*". She closed the door and locked it. When she came out of the room, only Laura was sitting on the couch in the sitting room. She asked Laura if she had seen Frank coming into the room. She said, "Yes", blankly. Then she asked her, "*Why didn't you come and check?*" Laura did not answer. Then she explained to Laura what had happened.
19. She just stayed inside the room on the phone because she knew her cousin, Theresa, was coming to meet her that afternoon. They talked about what happened that morning. Towards the evening, she realised that she wasn't emotionally strong enough to meet anybody else. She messaged Theresa to cancel the plans. The whole of Saturday, she remained in the room at Frank's house.
20. On the next day (Saturday) evening, she decided to return to Suva. She asked Laura to knock on Frank's door so that she could ask him about what happened in the morning. Laura went and knocked on Frank's bedroom door. When Frank came out of the room, the first thing he said was, *Where's everybody? Where's the party at?* She asked him, *What the hell happened this morning?* They had a conversation. Frank said to her, "*I thought you signalled to me*". She asked him, "*What kind of signal?*" He did not answer. She said, "*Why would I want to signal something like that to you? You're like a brother to me*".
21. She told him that she wanted to go back to Suva that same night. But there were no buses available. He gave \$200, the taxi fare. She and Laura did not leave that same day because it was raining heavily, and they could not get a taxi. They slept in the guest room at Frank's house. On Sunday morning, she and Laura left for Suva.
22. Later in the evening, she spoke to her husband. When he mentioned Frank's name, she went quiet. He noticed something was wrong, so he started asking her, "*What's wrong?*" Then she explained to her husband what happened. Her husband broke down and told her to report it immediately. She did not want to report it because they were a family, and it wouldn't be an easy decision because Frank is like a brother to her.

23. When that happened that morning, she wanted to have a conversation with Frank in the afternoon and wanted to know why he did that to her, but he did not acknowledge his wrongdoing. She felt even more humiliated when he said that he thought that she wanted it. When she spoke to her husband about it, he told her it was the right thing to report it.
24. She reported it the next morning (on 18 September 2023) at Totogo Police Station. She was taken to a clinic opposite CWM for a medical examination. The police arrested Frank in November 2023.
25. Under cross-examination, Margery said that she did not bring her husband to Frank's place because she was coming to see her cousin, and she has three girls, so her husband stayed home.
26. When she went to sleep in Frank's guest room, she did not lock the door because they were a family. That was not the first time she had been to Frank's place; it was the third. She felt safe. When she saw Frank on top of her, she did not call out for any help. She immediately told him to get off her, and he did. Vaginal swab was taken from her during the medical examination. In her statement, she admitted that she could feel her vagina wet and being penetrated. She was not sure if Frank had ejaculated. She decided to stay an extra day at Frank's place after the events happened because, firstly, she wanted to talk to Frank, and secondly, there was no transport. She told the doctor that Frank was not violent.

Evidence for Defence

DW1 - Frank Jack Johnson (Frank) -The Accused

27. Frank testified that around 3 p.m., he was preparing a barbecue at his flat as he was expecting his niece, Laura, and his cousin, Margery. They came around 7 p.m. to spend the weekend. They were to celebrate Laura's friend's birthday, and Margery was bringing the money she owed him. Upon their arrival, they had drinks while he was barbecuing. Laura's friend Laisa came over as well, and they decided to go out around 10.30 p.m. They first went to Bar-One nightclub, and then moved to Whitehouse nightclub. When Whitehouse was closed, they returned home around 1 a.m.

28. After drinking beer at the nightclubs, he was fine and walking normally. When they arrived home by taxi, he went straight to bed in his room. He woke up around 4 to 5 p.m., when there was a knock on the door. The girls were asking for transport money to go back to Suva. He gave them their bus fare, but then they said the transport was hard to get, so they might need to go by taxi. So, he eventually gave them \$200 to pay for the taxi.
29. On 23 November 2023, the police visited him. When the allegation was put to him at the interview, he said he did not recall that incident. He has no recollection of having sex with Margery the whole night, until he got up on the 16th.
30. Under cross-examination, Frank said that Margery was ten years younger than him. She was treated as 'Yaca' in the family, having been named after his mother. She grew up with him and attended primary school from his house. He was treated as her big brother. There had never been a conflict between him and Margery. She used to visit him at the flats he occupied in the Nadi area, and they had drunk together several times. The last time they went out clubbing, she got angry when he decided to leave early. He, too, had spent nights at her place in Suva. No complaint had ever been made against him by Margery, and this is the first complaint that was raised against him.
31. He could not recall anything that happened from 2 a.m. until 4 p.m. He cannot perform sexual activity when he had a few drinks. Because he was sleeping, "*how could I be doing something else if I'm sleeping?*" He asked. He denied having had sexual intercourse with Margery on that morning.
32. He denied that he locked himself in his room until 4 p.m. because he was ashamed of what he had done to his small sister. The only conversation they had when he woke up was about the transport. Margery lied in Court. He has no idea why Margery has lodged this complaint against him.
33. Under re-examination, Frank admitted that he attempted to reconcile with Margery when his cousin (Margery's brother) wanted to try to settle everything. But his lawyer advised him not to speak to Margery.

DW2- WPC Laisani Kanavakaca

34. WPC Laisani interviewed Frank on 22 and 23 November 2023. The delay was due to the suspect, who is a captain, being on a journey. When he came back, he was arrested and interviewed.

DW3 - Dr Kesaia Drodro Tuidraki

35. Dr Kesaia has been based at Medical Services Pacific since 2023. She is an MBBS-qualified doctor with a Postgraduate Diploma in Sexual and Reproductive Health. She had six years' experience. She examined Margery Bingwor around 1300 - 1500 hours on 18 September 2023 and prepared a medical examination report (DE1). Under Specific Medical Findings in D12, she noted:

“The hymen is not intact, and there are no injuries seen with the naked eye, as this is the vagina of a sexually active female who has also delivered vaginally previously. Currish whitish discharge noted at the vaginal orifices and along the lower vagina wall. No perianal injuries seen.”

36. There was no observation of any recent injuries. Medical Officers look for injuries to relate them to the kinds of events as reported by the survivors. She examined the vagina of a sexually active female who had previously delivered vaginally as well, and these are nonspecific findings of sexual assault.
37. The whitish discharge that was noted on the vaginal orifice again is not specific to sexual assault because this can happen for many reasons, including medical and physiological reasons. There were no injuries around the perianal or anal area as well. The absence of any fresh injuries does not rule out sexual assault. The Accused is not implicated in her report.
38. Under Cross-examination, the doctor said that on average, she sees five sexual assault survivors a week. The history provided by the patient did not include physical assault or violent sex. The absence of fresh injuries does not rule out sexual assault. The reason is

that vaginal tissues heal rapidly due to their elasticity. Therefore, they cannot confirm nor exclude that sexual assault happened.

39. She did collect forensic evidence. The forensic results came out negative. It doesn't mean a sexual assault never happened. In some instances, when the perpetrator doesn't ejaculate inside, they (forensics) will not find any DNA sampling. It was negative for DNA because it only tests for sperm. That does not confirm or exclude that sexual assault happened.

Evaluation/Analysis

40. The Complainant says that she was vaginally penetrated by the Accused while she was asleep in the Accused's guest room. Having admitted that the Complainant was drinking alcohol with him on that night, the Accused completely denies the allegation. A complete denial of the alleged sexual intercourse means the Accused is putting the Prosecution to the test of proving, beyond a reasonable doubt, that the sexual act occurred at all.
41. The Accused says he cannot recall anything that happened after he fell asleep around 2 a.m. He neither denies nor admits that he was engaged in sexual intercourse with the Complainant. Having advanced an 'I can't recall' theory, the Accused denies having had sexual intercourse with the Complainant on the premise that he was asleep.
42. Maintaining this inconsistent position, the Defence says that the Complainant lied in Court. In the written submission filed, the Defence advanced several arguments to support its contention that the Complainant lied.
43. The Defence claims that the allegation of rape against the Accused would not have been possible, given the description by the Complainant of her body position on the bed. It is argued that it would be secondary to look outward and see broad daylight, as she was in the midst of live sexual intercourse, humping her sexually from the top.
44. In essence, this is what the Complainant said in that regard:

“I was lying on my back, turning my head to my right. I woke up to a feeling of body shaking. When I opened my eyes, the first thing I saw was the daylight coming from the window. I could feel something going on inside my vagina as my body was shaking. My legs were separated, and Frank was in between. I felt his penis in my vagina. Frank was having sex with me. I saw Frank's face on top of me, and his arms were down on the bed beside both my shoulders.”

45. It was the Complainant’s evidence that she was lying on her back, turning her head to her right. It is quite possible for her to see the daylight coming from the window first when she opened her eyes, even though the perpetrator was humping her sexually from the top. The Defence argument does not hold water.
46. The Defence challenges the Complainant's credibility based on her previous statement to the police. In that statement, the Complainant told the police that her vagina was wet and being penetrated. The Defence claims that this statement is contrary to her evidence, in which she allegedly denied any ejaculation.
47. Under cross-examination, the Complainant did not say that the Accused ejaculated in her. She told the doctor that she was not sure whether he ejaculated. *Q: You said there was ejaculation? A: I did not say that.* She only said in her evidence that she felt that her vagina was wet. There is no inconsistency between her previous statement and her evidence.
48. The Defence argument *vis-à-vis* inconsistency seems to be based on the misconception that a vagina cannot be wet without an ejaculation. Scientific, anatomical, and gynaecological evidence demonstrates that vaginal wetness (lubrication) is entirely separate from ejaculation. A vagina is naturally wet, and this moisture is entirely independent of the presence of semen and ejaculation. A woman can experience increased vaginal wetness during sexual activity even if she does not feel mentally aroused¹.

¹ Increased vaginal wetness can occur during sexual activity without mental arousal because lubrication is a physiological reflex, not solely dependent on subjective feelings. Physical stimulation can trigger blood flow to the genitals, causing lubrication even if a person feels little or no mental arousal. This phenomenon is often considered a normal, protective response. <https://www.medicalnewstoday.com/articles/326504>

49. The Defence claims that the medical report gave inconclusive results that could not support any forced penetration. The Defence appears to rely on the popular historical “rape myth” or stereotype that a rape victim should always have some visible physical injuries.
50. The doctor observed no fresh injuries that were consistent with the history relayed to her by the Complainant. Her hymen was not intact because the Complainant was a sexually active female who had previously delivered vaginally as well. Therefore, the status of the hymen is a nonspecific finding of sexual assault. The doctor's statement aligns with medical consensus that the hymen is not a reliable indicator of sexual activity, as its appearance varies naturally and changes due to puberty, hygiene products, or childbirth. In a sexually active woman with prior vaginal delivery, the hymen's status is considered a non-specific finding that cannot confirm or rule out sexual assault.
51. The doctor had not observed any fresh vaginal injuries or injuries around the perianal or anal area. She, however, said that the absence of any fresh injuries does not rule out a sexual assault. She gave possible reasons for her opinion. The history provided by the Complainant did not include physical assault or violent/ rough sex. From the testimony of the Complainant, we now know that she was allegedly penetrated when she was asleep. As soon as she felt the penetration, she woke up and ordered the perpetrator to get off her. He had just obeyed and stopped penetrating. She did not have to offer any resistance.
52. Based on the scenario described, the absence of physical resistance and the rapid cessation of the act suggest a lower likelihood of acute, severe trauma, such as deep lacerations or tears. Based on forensic research and medical literature, it is well established that sexual intercourse—both consensual and non-consensual—can take place without leaving visible physical injuries². Therefore, the absence of fresh genital injuries does not rule out nonconsensual sexual intercourse.
53. The doctor’s opinion can also be supported by the timing of the medical examination. The doctor said that vaginal tissues heal rapidly due to their elasticity. The doctor had

² <https://www.sciencedirect.com/journal/journal-of-forensic-and-legal-medicine>

examined the Complainant approximately two days after the alleged sexual intercourse³. The doctor's observation that vaginal tissues heal rapidly due to elasticity supports a finding of no acute injuries, especially when the examination occurs two days post-incident. Forensic best practices indicate that while sexual assault exams are ideally performed within 72 hours, rapid tissue healing can limit the visibility of injuries. Therefore, the absence of physical findings in this timeframe does not necessarily contradict allegations of sexual contact.

54. The whitish discharge that was noted on the vaginal orifice again is not specific to sexual assault because this can happen for many reasons, including medical and physiological reasons. Forensic evidence collection (like DNA) is often more critical than solely relying on identifying genital injuries. The doctor had taken vaginal swabs approximately two days after the alleged assault. The forensic results have come out negative. She opined that a negative result doesn't mean a sexual assault never happened. There is no evidence that the perpetrator ejaculated inside. The forensic experts may not find any DNA from the perpetrator, and the results would come back negative for DNA. Therefore, the forensic analysis cannot be expected to confirm sexual intercourse or implicate the Accused in any way.
55. Based on legal principles and case law, the fact that medical and forensic results are inconclusive does not automatically create reasonable doubt in the prosecution's case, as the absence of physical evidence does not necessarily mean a sexual act did not occur. While forensic evidence is often crucial, it is not always present, particularly if too much time has elapsed.
56. The Defence argues that there was enough light in the room to alert a third party for assistance, given that the door was fully open, and her niece was sleeping in the living room. The Complainant's evidence was that, as soon as she realised that she was being penetrated, she told the Accused, "*What the fuck is wrong with you? Get off me*". The Accused immediately got off her. Under these circumstances, she would not have needed a call for assistance.

³The alleged sexual intercourse took place around 8 a.m. on 16 September 2023 and the medical examination was done at 1 .18 p.m. on 18 September 2023.

57. After the assault, she said she rushed to the washroom and, upon her return, she complained to her niece, Laura, and blamed Laura for not checking what the Accused was up to. At that time, Laisa had not been in the living room. The Complainant explained why she did not lock the door (there was no evidence that the door was fully open, as the Defence suggests). The Defence submits that no statements have been recorded either from Laisa or Laura to corroborate the allegation. It is also submitted that the words of the Complainant can only be construed as hearsay and deemed inadmissible.
58. It is a trite law that no corroboration is required to prove a sexual offence in Fiji. I concede that the police should have recorded a statement from Laura because the Complainant had mentioned that Laura was present in the living room, talking to the Complainant after the alleged attack. However, the police's failure to record a statement from Laura or Laisa does not make the Complainant less credible.
59. The Complainant provided direct evidence of what she felt, saw and heard. Her evidence does not become hearsay merely because an independent source did not corroborate it.
60. The Court is not obliged to believe the Complainant's evidence that she relayed the incident to Laura soon after the incident because Laura did not give evidence to support the Complainant's version. However, the Complainant complained to the police on 18 September 2023 and relayed the incident to the doctor, approximately two days post assault.
61. The Complainant explained the delay of two days. She thought about the family consequences and was reluctant to report because the Accused was her cousin.
62. It was argued that if the Complainant were genuinely sexually assaulted, she would have left the Accused's residence at the first available opportunity, yet she stayed back for an extra day.
63. A reasonable explanation for Complainant's conduct is found in her evidence. The Accused said that the Complainant came to spend the weekend at his place. Therefore, it was her original plan to stay, and the Saturday stay was not an extra day. After the assault, she did not leave and stayed back at the Accused's house because she wanted to have a

conversation with the Accused to know why he did that to her. She also had plans to celebrate her graduation with Theresa on Saturday evening, but she decided to cancel it because she was distressed after the assault. It was raining heavily, and transport was not available. These explanations are reasonable to justify why she did not leave the Accused's house immediately.

64. The belated complaint was also adequately explained. In the conversation after the alleged attack, the Accused was not ready to acknowledge his wrongdoing. The Complainant felt even more humiliated when he said that he thought she wanted it. She left for Suva the next morning (Sunday) by bus (the journey would have taken at least four hours), but she did not complain to her husband impulsively. She relayed the incident only when her husband questioned her after noticing her behaviour. She was reluctant to complain to the police despite her husband's insistence because the Accused was his cousin. After a conversation with her husband, she was convinced that it was the right thing to report. The delayed complaint and her not leaving the Accused's house immediately after the alleged rape are justified. I am sure the complaint she eventually made to the police is genuine.
65. The evidence does not demonstrate that the Complainant had an ulterior motive to make up a case against her cousin, who had been very close to her since her childhood. There was not even a suggestion during cross-examination that she was lying because she had a motive to lie. Even the money her husband had borrowed had been returned to the Accused upon her arrival at the Accused's flat. There is nothing to suggest that the money issues led to filing a false complaint.
66. During cross-examination, it was never suggested by the Defence that the Complainant was lying or that her narrative on the alleged sexual act was implausible. Because the Complainant was fast asleep after consuming alcohol, it was possible that she did not feel the Accused taking off her pants and panties, which had easily removable elastic waists.
67. The Complainant presented consistent and credible evidence. The failure on the part of the Defence to mark any contradiction between her evidence and her previous statement suggests that she maintained consistency in her narrative. She was straightforward and

not evasive. Her demeanour is consistent with that of an honest rape victim. I am satisfied that the Complainant told the truth in Court.

68. The narrative of the Defence is inconstant and implausible. His defence that he did not recall anything after he went to bed is highly implausible. He did not say in clear terms that the sexual intercourse never happened. 'I can't recall' would mean that it may have happened, but he can't recall it now for some reason or another.
69. The Accused almost sailed with the Complainant's narrative, and his denial is associated only with the alleged sexual intercourse and what transpired thereafter. It appears that the Accused manufactured the 'I can't recall' theory for his convenience to evade the backlash after violating the family norms. He did not come out of the room until around 4 p.m. His conduct is consistent with the Prosecution's theory that he was reluctant to face the Complainant because he was guilty of what had happened.
70. When the Accused was asked by his counsel to add anything else he would like to tell the Court, he said: "*When I went to Bar One, the Complainant was acting wild in the club. She was behaving flirtatiously and was yelling out, I want to have sex*" The State Counsel objected to his evidence because it offended the Brown and Dunn rule, i.e., this was never put to the Complainant when she took the stand.
71. Although this statement forms no part of the Defence evidence, it demonstrates how the Accused was trying to counter the Complainant's claim that he had uttered "*I thought this is what you wanted*" and "*I thought you signalled to me*". It appeared that the Accused was trying to counter the Prosecution's theory and justify his conduct, which is, however, totally inconsistent with the Defence's "I can't recall" theory.
72. The evidence of the Accused is not appealing to me. He is evasive and trying to save his skin by advancing an "I can't recall" theory for his convenience. I am convinced that the Accused was not telling the truth.
73. The Complainant's evidence, which I accept, satisfies all the elements of rape as charged. The Accused penetrated the vagina of the Complainant when she was asleep. She did not consent to any sexual activity or send any indication to that effect to the Accused. He

knew that she was sleeping and not consenting to sexual intercourse. The Prosecution proved the charge beyond a reasonable doubt. I find the Accused guilty of Rape as charged and convict him accordingly.



Aruna Aluthge

Judge



24 February 2026

At Lautoka

Solicitors:

Office of the Director of Public Prosecutions for the State
Law Solutions for Defence