

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 70 of 2019**

**STATE**

**V**

**APOROSA NALIMA**

**Counsel** : Mr. Joeli Nasa for the State  
Ms. Jotishna Nair with Mr. Nemani Vakacakau and Ms. Sangeeta Devi for the Accused

**Dates of Trial** : 13-16 September 2022

**Closing Submissions** : 22 September 2022

**Judgment** : 7 November 2022

*The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "TK".*

## **JUDGMENT**

**[1]** As per the Information filed by the Director of Public Prosecutions (DPP), the accused, Aporosa Nalima, is charged with the following offence:

### **FIRST COUNT**

#### ***Statement of Offence (a)***

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

#### ***Particulars of Offence (b)***

**APOROSA NALIMA**, on the 30<sup>th</sup> day of March 2019, at Nadi, in the Western Division, penetrated the vagina of **TK** with his penis, without the consent of the said **TK**.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 4 days. Thereafter, the Learned Counsel for the Defence and the State made their closing submissions.

### **The Burden of Proof and the Standard of Proof**

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) *The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*

(2) *The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

(3) *In this Decree (Act)—*

*"legal burden", in relation to a matter, means the burden of proving the existence of the matter.*

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

### **Legal Provisions and the Elements of the Offences**

- [5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

- [6] Section 207(1) of the Crimes Act reads as follows:

*207. — (1) Any person who rapes another person commits an indictable offence.*

- [7] Section 207(2) of the Crimes Act is reproduced below:

*(2) A person rapes another person if —*

*(a) the person has carnal knowledge with or of the other person without the other person's consent; or*

*(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*

*(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

**[8]** Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic or legal euphemism (synonym) for sexual intercourse. In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile-vaginal sexual intercourse with that other person or having sexual intercourse whereby the man penetrates his penis into the vagina of the woman.

**[9]** In terms of Section 206 (5) the term carnal knowledge is said to include sodomy or anal sexual intercourse as well.

**[10]** Therefore, in order to prove the count of Rape, the prosecution must establish beyond reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case the 30 March 2019);

(iii) At Nadi, in the Western Division;

(iv) Penetrated the vagina of the complainant TK with his penis;

(v) Without the consent of the complainant; and

(vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

**[11]** To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

**[12]** The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

**[13]** The fourth element involves the penetration of the complainant's vagina, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable

doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

**[14]** The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.

**[15]** It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(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.

**[16]** Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or that he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

**[17]** A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 37 years of age at

the time of the alleged incident, and therefore, she had the mental capacity to consent.

[18] It must also be noted that in terms of Section 129 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act), it is stated that no corroboration of the complainant's evidence is necessary to prove an offence of a sexual nature. Rape is obviously considered as offence of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

### **The Admitted Facts**

[19] Section 135 of the Criminal Procedure Act deals with "Admission of facts". The Section is reproduced below:

*135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.*

*(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—*

*(a) by the prosecutor; and*

*(b) by the judge or magistrate.*

*(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.*

[20] Accordingly, the prosecution and the defence have consented to treat the following facts as "Admitted Facts":

1. THAT TK (hereinafter referred to as the "complainant"), was 37 years of age at the material time.
2. THAT Aporosa Nalima (hereinafter referred to as the "accused") was 33 years of age and resided at Nabila Village at the material time.
3. THAT the complainant was employed as a chef and a care-taker for Sun City whereby she was residing at the material time.
4. THAT the accused was employed as a boat captain and surf instructor at Tavarua Island Resort at the material time.
5. THAT the accused is also known as "Abo".

6. THAT sometimes in 2017, the complainant met the accused at Tavarua Island Resort.
7. THAT the complainant and the accused are known to each other.

[21] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

### **Case for the Prosecution**

[22] The prosecution, in support of their case, called the complainant, TK, who was their sole witness. The prosecution also tendered to Court a sketch plan of the house the complainant was living in (drawn by the complainant) as Prosecution Exhibit PE1.

### **[23] Evidence of the complainant TK**

- (i) *The complainant’s evidence was recorded in a ‘closed court’.*
- (ii) *The complainant testified that she is currently residing at Uciwai Settlement, in Nadi and is doing domestic duties (she is currently unemployed). She has been residing at Uciwai Settlement since 2011. She moved to Uciwai Settlement from Lautoka. She is living with her younger sister who is said to be married at Yako Village.*
- (iii) *When asked for her marital status, the witness said she is divorced.*
- (iv) *She is now 42 years of age. As per the Admitted Facts, the complainant was said to be 37 years old at the time of the alleged incident.*
- (v) *The witness testified that on 30 March 2019, she was living at Sun City. Sun City is a surf camp. It is located close to Uciwai in Nadi. It is an Agreed Fact that the complainant was employed as a Chef and a Caretaker for Sun City whereby she was residing at the material time (Paragraph 3 of the Admitted Facts).*
- (vi) *That day she had been invited to cook at a function at Yako Village. She had left to do the cooking around 1.00 – 2.00 p.m.*
- (vii) *After completing the cooking, she had left Yako Village in a car with her uncle. It was around 9.00 p.m. when she had left. After dropping off her uncle at Uciwai, she had continued her journey to Sun City by foot. She had reached Sun City at 9.20 p.m.*
- (viii) *After reaching Sun City, she had entered her house and locked all the doors from inside. The witness said that her house in Sun City is a hurricane proof concrete house. It is situated close to the sea.*
- (ix) *The witness testified that she had her bath and then changed into her sleeping shorts and blue vest. She said she did not wear any panty or bra because she was going to sleep and she knew she was alone at home.*

- (x) *The witness was asked to draw a sketch plan of the house. The sketch plan drawn by her was tendered to Court as Prosecution Exhibit PE1.*
- (xi) *As per the sketch, the house has a kitchen, an office, a lounge area and a master bedroom. Between the kitchen area and the lounge area, there is a counter (kitchen counter). There is another counter between the office and the lounge area. There were 7 doors in total, including a door leading from the office to the bedroom. There were 3 doors at the front of the house and 3 doors at the back. The bathroom and the toilet is inside the bedroom.*
- (xii) *The witness said that she then lied on the bed with her face down. This would have been around 9.30 p.m. She had fallen off to sleep. She said: "I did not hear anything. All I could feel was someone laying on top of me from my back".*
- (xiii) *The following questions were then asked from the witness and she answered as follows:*
- Q. *Then what happened?*
- A. *I thought it was something bad-like a ghost. I thought it was a ghost. I put my hand, then I feel his head. Then I came to know it is a human.*
- Q. *What did you do?*
- A. *I asked who is this? The reply came with a hush sound (the witness demonstrated how this sound was made) "It's me Abo".*
- Q. *What happened next?*
- A. *I asked him what he wanted? How he entered the house? He said he wants me. I told him wait to on the light so we can talk. He said: "No, you will run away". At that time when we were talking, he was pressing me down with his right hand, with his left hand, trying to remove my shorts.*
- Q. *What was your lying position at that time?*
- A. *When I felt it was a human, I turned back to look at him (the witness demonstrated how she did so). He pushed my right shoulder back down. He came on top of me. When he tried to turn me-he pushed me forcefully from my right arm. Then I turned face up.*
- Q. *Who was the person on top of you?*
- A. *I saw him, the inside light was offed. The solar light that was outside was on. I saw him. It was Abo.*
- Q. *How was Abo positioned?*
- A. *When I faced upwards he was sitting on my thighs.*
- Q. *What happened next?*
- A. *I struggled. I tried to push him away. I was scared. He might hurt me. I felt if I shouted, nobody would be able to hear me because it is a hurricane*

*proof house. I was struggling really hard to push him away. After that, I could feel he inserted his penis into my vagina.*

*At that point in time, my shorts had gone half way down. While I was struggling, I was trying to pull my shorts upwards. He was pressing his right hand on my chest downwards.*

Q. *How was your shorts removed halfway?*

A. *Aporosa pulled it down with his right hand pressing me down. He used his left hand to pull it down. With his left leg trying to open my legs/thighs.*

*I can feel the pain from my chest area (witness demonstrated how this was).*

Q. *How did you react when this was happening?*

A. *I tried to move around. I was weak. I could feel something was taken from me. Starting from that day, my life changed. It's not easy for me to come and stand here-my family, my friends will look bad at me-have a bad impression of me.*

Q. *Did he manage to open your legs with his left leg?*

A. *While he was trying to separate my legs-he was strong. I can't close my legs. Because his leg was strong. At that point in time, I was trying to push him away with my hands. I couldn't push him away because he was strong.*

Q. *What was Abo wearing at the time?*

A. *He was wearing his t-shirt. His shorts went down. He was wanting to do that to me.*

Q. *Who pulled Abo's shorts down?*

A. *Maybe himself.*

Q. *Did you see how he removed his shorts down?*

A. *I did not see him moving his shorts down. All I could feel was he inserting his penis into my vagina. I was struggling to try and push him away.*

Q. *How long did Abo insert his penis into your vagina at the time?*

A. *Not long. It took around 5 minutes. The total time that we were struggling with each other was around 20 minutes.*

Q. *When Abo inserted his penis into your vagina-when you were trying to push him, did he stop?*

A. *No, he didn't stop.*



Q. *Did you agree for Abo to insert his penis into your vagina at that time?*

A. *No sir. I did not agree.*

Q. *What happened next?*

A. *After he inserted his penis, I felt my vagina wet. He wore his shorts and went outside. I touched around for my shorts to wear and to follow him. To see which door he used to come in.*

Q. *From what was your vagina wet with?*

A. *Maybe Aporosa came because he inserted his penis into my vagina.*

(xiv) *Thereafter, the complainant testified that she had worn her shorts and followed Aporosa to see which door he used to come in. She had come out of her bedroom. She had stood near the counter. From there she could see the whole passage and also the 3 doors in front. Aporosa had used the third front door to exit the house. She could see this as the solar light outside was on. The solar light was on the facade board facing the house.*

(xv) *The witness continued that this door was a half door. When he went, Aporosa had opened the bottom half of the door and gone outside. She could see that Aporosa was wearing a surf shorts and a grey t-shirt. He had then got into a black hybrid vehicle and driven away.*

(xvi) *The complainant said, as at 30 March 2019, she had been living in that house for 5 years since 2014.*

(xvii) *The complainant testified further that when Abo had put his penis into her vagina, she really felt that her right as a woman was no more.*

(xviii) *After Aporosa had left, the witness said she had felt really weak. She got hold of her phone and called the Nawai Police Post. They called the Nadi Police Station. Around about 12.00 midnight a Police vehicle came and she went in that vehicle to the Nadi Police Station. The Police had informed that they were waiting for another vehicle to take her to hospital.*

(xix) *When she had called the Police, she had told them that Aporosa had come and did something to her inside the house.*

(xx) *At that time another Police vehicle stopped and Aporosa got off that Police vehicle. He came and stood in front of her and asked her to forgive him. The Police had then taken him inside the Police Station.*

(xxi) *From the Police Station, she had been taken to the Nadi Hospital where a female iTaukei doctor had examined her. Thereafter, the Police had dropped her back at Sun City. This was around 6.00 the next morning.*

(xxii) *Around 8.00 a.m. the Police had come and recorded her statement.*

(xxiii) *The complainant confirmed that sometime in 2017 she had met Abo at Tavarua Island Resort (Paragraph 6 of the Admitted Facts) and spoken to him. So she knows him since 2017.*

- (xxiv) *The complainant identified the accused in the dock as Aporosa Nalima also known as Abo.*
- (xxv) *She said that the Sun City has 5 Villas. At the time, only one Villa was occupied by one Wilson. All her neighbours were staying far from Sun City (they were not occupying the Villas). She said her nearest neighbour was an old couple, with the husband being a half stroke patient.*
- (xxvi) *The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant in line with the defence case.*
- (xxvii) *The complainant was questioned at length regarding her house at Sun City in relation to the sketch plan (PE1) drawn by her. She agreed that there is a verandah or a porch that runs along the front portion of the building. The verandah covers the whole front portion of the building and is made out of cement railings.*
- (xxviii) *The witness said that all the doors except door no. 2 in the front, when locked from inside they cannot be opened from outside. As to door no. 2 at the front, it can be locked from both inside and outside. Therefore, she agreed that anyone will require a key to open the door (door no. 2) from outside.*
- (xxix) *The witness agreed that she and Abo have been facebook friends and that she had known Abo since 2017. She agreed that the two of them had been chatting with each other through messenger and other chat media services. She denied having sending Abo any pictures of herself or Abo sending pictures of himself to her.*
- (xxx) *It was suggested to the witness that when she and Abo had first met at Tavarua Island Resort that they had had sex. She denied this suggestion and said: "I rejected him from the island because I know he is married".*
- (xxxii) *It was further suggested to the complainant that there were occasions during the two years that she and Abo had made plans to meet up. The witness said that there was no conversation with him to meet up.*
- (xxxiii) *It was suggested that on the night of the 30 March 2019, she and Abo had planned to meet and that he was supposed to come to her. The witness denied this suggestion. It was further suggested that when the accused came to Sun City, he had knocked on the door and it was she who had directed him from which door to enter. It was also suggested that the accused was able to see her and she was able to see him through the window that was visible from the bedroom. The witness denied these suggestions.*
- (xxxiv) *It was further suggested to the complainant that she knew that the accused was coming to her place and that she was waiting for him in her bedroom. It was also suggested that it was she who had told him which door to come into the house and directed him to the bedroom. The complainant completely denied these suggestions.*
- (xxxv) *It was further suggested that after the accused came into her bedroom, he took a shower in the toilet of the master bedroom. It was suggested that*

*thereafter the accused had sex with her in which she was a willing participant. That the sexual intercourse that evening took place with her consent. The witness denied these suggestions.*

*(xxxv) It was suggested that after having sex with her, the accused got dressed and was leaving her bedroom. However, she had wanted him to spend the night with her but he had refused as he had to return the vehicle he had come in. At the time the accused was leaving, it was suggested that she had asked him for \$50.00. However, the accused had responded that he had to take the boat out the next morning and he will give her the money once he returns from the trip. It was suggested that at that stage the complainant had threatened him that she will report him to the Police if he doesn't give her any money. The complainant denied all these suggestions.*

*(xxxvi) The complainant said that during the 5 minutes the accused was inserting his penis into her vagina, it was done in an aggressive manner. She further said: "I felt weak and have bruises into my vagina. I felt pain inside."*

*(xxxvii) It was suggested to the complainant that she had told the doctor who had examined her that the accused had entered the house and forcefully insisted to have sexual intercourse with her. And that he used his fingers, tongue and penis-after which he drove off. The witness said that she cannot recall.*

*(xxxviii) It was finally suggested to the witness that before the accused penetrated his penis into her vagina with her consent, he had also fingered her and also used his tongue on her vagina. The complainant agreed to this suggestion.*

*(xxxix) In re-examination, the Learned State Counsel, attempted to clarify certain answers given by the complainant during her cross-examination.*

**[24]** At the end of the prosecution case Court decided to call for the defence. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

**[25]** The accused decided to testify on his own behalf. He also called Dr. Sainimili Bulatale in support of his case.

**[26] Evidence of Aporosa Nalima**

- (i) The witness testified that he is residing at Nabila Village and is 36 years of age. He is currently a Farmer by occupation.*
- (ii) The witness said that he knows the complainant (TK) since 2017. He came to know her when he was working at Tavarua Island Resort. He was working as*

*a Boat Captain looking after the tourists and also as a Surf Instructor for the tourists.*

- (iii) The witness testified to as to how he came to know the complainant for the first time at the Tavarua Island Resort. On that day he and the complainant had ended up having sexual intercourse underneath a tree on the beach close to the sea. This was around 10.00 – 11.00 in the night.*
- (iv) The witness said that thereafter, they had been in touch over the phone and they were connected on facebook. They were frequently chatting through facebook messenger, mostly through video calls. They had been in contact with each other for nearly two years.*
- (v) The witness testified to the events which took place on 30 March 2019, (which was a Saturday). He said it takes 6 to 7 minutes to drive from Nabila Village to Sun City. On that day he had come to the complainant's house at Sun City in his uncle's car. He had parked the car in the front porch and walked up to the porch. He had then knocked on door no. 2 in the front.*
- (vi) The complainant had told him that door no. 3 was open and instructed him to come into the house through that door. At the time the complainant had been on the bed in the master bedroom. After entering the house, he had gone into her bedroom. He had then had a shower in the master bedroom. Thereafter, he had gone and lied down beside her.*
- (vii) The witness said: "Then we were talking (talanoa). Then we started kissing. We were hugging each other. Then I started touching from her stomach to her private part.....we continued kissing. I touched her stomach to her private part. She was still having her clothes on. I was touching her on top of her clothes (above her clothes). She also touched me on my penis on top. Then I put my hand inside to touch her private part. She opened her leg nicely. One of her hands was hugging me. The other hand was touching my private part. Then we started to have sex."*
- (viii) When asked to further explain, the witness said: "I started sucking her breast. I licked her stomach, going down towards her private part. She removed her shorts beneath the knee. She only removed one side. The short was on the other side of the leg. I was in between her legs. So her legs were on the bed with her knees folded. She was facing up. When I started to lick her vagina, both her hands were on my head.....while I was licking her, at the same time I was also using my finger-used my 3 fingers and with the palm of my hand I was rubbing the surface of her private part because it was nicely big (witness demonstrates how this happened). When licking her and using my finger her legs were lifted up and her hands were on my head. I licked her stomach to her breast. When I moved up to her breast, I inserted my private part.....after licking her vagina, I was going up to her stomach. I removed my surf shorts before inserting my private part (my penis) into TK's private part (vagina)."*
- (ix) The witness said that he inserted his penis into the complainant's vagina several times until he ejaculated. This went on for about 6 to 7 minutes.*

- (x) *The witness said that the complainant gave her consent for them to be together. He said if it was without her consent, he would not have done what he did.*
- (xi) *The witness testified that thereafter he wore his clothes and sat on the bedside. The complainant came from the toilet and asked if they could spend the night together. He had informed that he has to return the car to his uncle at 10.30 p.m.*
- (xii) *The witness said that he was about to leave from the bed when the complainant had asked him for \$50.00. He had informed her that he didn't have any cash with him at the time. He had said when he goes to work the next day (Sunday) he will return from work at 3.00 p.m. and give her the money. This conversation had taken place inside the bedroom. The complainant had said that if he doesn't give her the money, she will call the Police.*
- (xiii) *He had then got into his car and left Sun City and return to his house at Nabila Village.*
- (xiv) *Around 3.30 – 4.00 a.m. the next morning, the Police had arrived at his house and called him. The Police had said they wanted to question him about an incident which happened at Sun City. They had taken him straight to the Nadi Police Station.*
- (xv) *The witness was cross-examined at length by the Learned State Counsel and the prosecution version of the events were suggested to him.*

**[27] Evidence of Dr. Sainimili Bulatale**

- (i) *The Doctor testified that she is currently attached to the Border Health Protection Unit.*
- (ii) *She had graduated with an MBBS Degree from the Fiji School of Medicine in 2013. Thus she has been a Medical Practitioner for the past 9 years. The witness said that she is working as a General Practitioner.*
- (iii) *The witness said that she has worked at the Nadi Hospital, Bukuya Health Centre (Navosa) and Namaka Health Centre.*
- (iv) *The witness testified that she had conducted the medical examination on the complainant, TK, on 31 March 2019, commencing at 3.25 a.m., at the Nadi Hospital. The Medical Examination Report was tendered to Court as Defence Exhibit DE1.*
- (v) *The witness said that as per the history related by the complainant (column D10 of the Medical Examination Report) she had informed that a man entered the house and forcefully insisted to have sexual intercourse with her. He used his fingers, tongue and penis-after which he drove off.*
- (vi) *The doctor explained that the history is usually told by the person being examined to her. It is related to her by the patient. When asked whether it is likely that she would have recorded this from a third person, the doctor said,*

*no. She continued: "We know it is a legal document. So we always write down what the patient says".*

- (vii) The Doctor testified as to the specific medical findings as found in column D12 of the Medical Examination Report.
  - (a) The examination of the Head, Ears, Eyes, Nose and Throat (HEENT) – The doctor has noted as om pink/moist, which means that this portion was okay.*
  - (b) The examination of Chest, Abdomen and Exteriors – The doctor has noted that there was nothing abnormal to report (NAD).*
  - (c) The examination of the Genitalia – The doctor has noted that there was a slight bruise noted on the left labia majora, but nil bleeding. A whitish discharge was also noted. The doctor had taken a high vaginal swab and a low vaginal swab for further examination.**
- (viii) The doctor confirmed that where a finger or tongue was used on the genitalia, it was likely for the slight bruise to be caused on the left labia majora.*
- (ix) When asked to explain the reasons for the whitish discharge, the doctor said that it could be semen. However, she could not confirm this with certainty. This is the reason why the doctor had taken a high vaginal swab and a low vaginal swab for further examination. The doctor was unaware as to the results of the said further examination.*
- (x) The doctor further explained that other causes for the white discharge was that it could be normal vaginal fluid or it could be caused by any sexually transmitted infection (STI).*
- (xi) The doctor confirmed that there was no bruising noted on the complainant's chest area or thigh area or in any other part of the complainant's body. The doctor further confirmed that there was no injuries found on the inside of the complainant's vagina.*
- (xii) As per her professional opinion (column D14 of the Medical Examination Report), it is stated acute injury – consistent with sexual assault. The doctor explained that by acute it meant, a recent injury.*

## **Analysis**

**[28]** The prosecution in support of their case, called the complainant, TK, who was their sole witness. The accused testified on his own behalf. He also called Dr. Sainimili Bulatale in support of his case.

**[29]** The burden of proving each ingredient of the charge of Rape rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove the elements of the charge

beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove in this case at paragraph 10 of this judgment.

- [30] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as admitted facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.
- [31] Based on the said admitted facts it is admitted that the complainant and the accused are known each other and that they had met sometime in 2017, at Tavarua Island Resort.
- [32] I have summarized the evidence of all the witnesses led during the trial. The complainant had testified as to how the accused had come to her house in Sun City and forcibly inserted his penis into her vagina, on the night of 30 March 2019. She has testified that she did not agree or consent to the accused inserting his penis into her vagina.
- [33] The accused admits that he went to the complainant's house at Sun City on the night of 30 March 2019. He states that he went to the complainant's house as previously planned by the two of them. On arriving at her house the complainant had instructed him how to enter the house through door no. 3 in the front.
- [34] The accused testifies that he did have sexual intercourse with the complainant with her consent. Prior to inserting his penis into her vagina, the accused submits that he had indulged in foreplay by licking and touching the complainant's vagina.
- [35] During the course of her evidence in chief, the complainant only testified to the accused inserting his penis into her vagina without her consent. However, during the cross-examination she admitted that prior to the accused penetrating his penis into her vagina, that he had also fingered her and used his tongue on her vagina. Even in the history given by her to the doctor who examined her (Defence Exhibit DE1), she has stated that the accused had used his fingers, tongue and penis during the course of having sexual intercourse with her.
- [36] Therefore, it is clear that prior to the accused inserting his penis into the complainant's vagina that he had used his fingers on her vagina and also licked her vagina. This version is compatible with the accused's version of events where he submits that he

indulged in foreplay with the complainant prior to having consensual sexual intercourse with her.

[37] It is also important to note that as per the complainant's testimony, she had stated that on the night of this incident, 30 March 2019, she had locked all the doors leading to her house from inside once she had entered the house.

[38] Therefore, for the accused to gain access to the house, one of the doors had to be opened from the inside. Otherwise the accused would have had to break into the house. There is no evidence elicited in Court to establish that the accused broke into the complainant's house (although the complainant said in cross-examination that after a few days she detected that there was an opening besides the louvers in door no. 2).

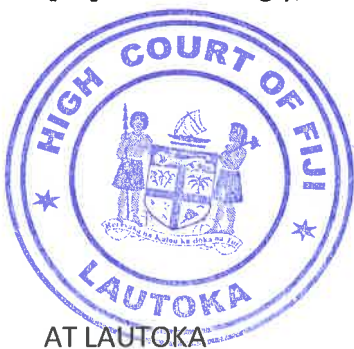
[39] The accused's testimony is that the complainant had told him that door no. 3 was open and instructed him to come into the house through that door.

[40] In the circumstances, in my opinion, the defence version of the events are more probable and reliable than that of the prosecution.

[41] Therefore, it is my opinion that the prosecution has failed to prove the charge of Rape against the accused beyond reasonable doubt.

[42] In the circumstances, I find the accused not guilty of the charge of Rape with which he is charged.

[43] Accordingly, I acquit the accused of the charge of Rape.



  
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Dated this 7<sup>th</sup> Day of November 2022

Solicitors for the State:

Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused:

Falcon Chambers, Barristers & Solicitors, Lautoka.