

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

**Criminal Case No.: HAC 134 of 2017**

**STATE**

**V**

**SEREMAIA BATIALIVA**

**Counsel** : Ms. L. Latu for the State.  
: Ms. V. Narara and Ms. S. Ali [LAC] for the Accused.

**Dates of Hearing** : 17, 18 April, 2019  
**Closing Speeches** : 23 April, 2019  
**Date of Summing Up** : 23 April, 2019  
**Date of Judgment** : 24 April, 2019

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**JUDGMENT**

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*(The name of the complainant is suppressed she will be referred to as "JS").*

1. The Director of Public Prosecutions charged the accused by filing the following information:

**FIRST COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**SEREMAIA BATIALIVA**, on the 24<sup>th</sup> day of June, 2017 at Matanagata, Vatukoula, in the Western Division, unlawfully and indecently assaulted "JS".

## **SECOND COUNT**

### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.

### *Particulars of Offence*

**SEREMAIA BATIALIVA**, on the 24<sup>th</sup> day of June, 2017 at Matanagata, Vatukoula in the Western Division, penetrated the vulva of “**JS**”, a child under the age of 13 years, with his finger.

2. The three assessors had returned with a unanimous opinion that the accused was guilty of one count of sexual assault and one count of rape.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called six (6) witnesses whereas the accused exercised his right to remain silent and did not call any witness.
5. The victim who was 7 years of age in 2017 was called by the prosecution as its second witness. At the time of giving evidence the complainant was about 9 years of age.
6. The complainant told the court that she did not understand the meaning of oath hence oath was not administered. However, this court conducted a competency test to satisfy itself whether the complainant was able to understand the questions asked. After asking a series of questions the court was satisfied that the complainant was possessed with the ability and level of intelligence to understand the questions asked and answer the same.
7. In accordance with section 117 (2) (b) of the Criminal Procedure Act the court decided to dispense with the administration of oath taking into

consideration the age of the complainant. The complainant gave unsworn evidence.

8. The complainant recalled on 24<sup>th</sup> June, 2017 her *Tatai* the accused had touched her thighs and then put his right hand right up to her private part as a result of what the accused did the complainant felt pain in her private part.
9. The accused had put his hand inside her shorts the hand touched right inside where she always goes to the washroom.
10. The complainant then pushed the accused hand away and ran to her mother's room. After the accused left she told her mother everything that happened. She waited for the accused to leave because she was scared of him.
11. Siteri Nabite the mother of the complainant recalled on 25<sup>th</sup> June, 2017 the complainant came and told her that when she visited the washroom it was painful. The witness did not think it was something serious she thought it was due to stomach ache so she told the complainant to take panadol.
12. At 3pm the accused the uncle of the witness left her home having arrived home a few days ago on the 23<sup>rd</sup> when he left the complainant came and sat beside the witness. The witness noticed the complainant's reaction was as if she was trying to tell her something. The complainant said *Tatai* referring to the accused did something to her. When the witness heard this it made her really scared so the witness asked the complainant nicely what had happened.
13. The complainant responded by saying *Tatai* had put his fingers inside her panty. The witness asked again and the complainant said *Tatai* put his fingers inside her panty in the morning when she was reading on the settee.

14. When the witness heard this she was lost she did not know what to do she wanted to cry. She tried to call her husband despite knowing the fact that he will not answer the phone since he was working in the mine underground.
15. The witness then called her sister in Sigatoka and told her what the complainant had told her. Her sister reported the matter to the police. When after one day nothing happened on the 26<sup>th</sup> she went and reported the matter at the Vatukoula Police Station.
16. The third witness Dr. Narayan on 26<sup>th</sup> June, 2017 had examined the complainant at the Tavua Hospital. The specific medical finding of the doctor was:
  - a) Hymen was intact there was no discharge from the vagina, no bleeding, the mucosa which is the skin of the vagina appeared pink and;
  - b) some excoriation on the left labia on the lower side was seen with no bruise.
17. The doctor explained excoriation meant an abrasion to the lower part of the labia which is the outer part of the vagina. Excoriation was like a friction related injuries caused by any blunt force applied across the skin surface.
18. The doctor further stated that the outer part of the vagina mainly the labia which was the minor and major and the opening of the labia with the clitoris are all collectively known as the vulva.
19. In the professional opinion of the doctor the injuries seen were friction related excoriation approximately 24 to 48 hours after force had been applied to the labia.

20. At page 5 of the medical examination form (prosecution exhibit no. 2) the doctor explained the diagram he had drawn. He labeled the left and right side of the patient and that the diamond shaped illustration represented the vaginal cavity or the opening which was called the introitus and just outside the doctor marked the excoriation of the skin surface he had seen.
21. The fourth prosecution witness Police Constable Nemani Lutumailagi recalled on 28<sup>th</sup> June, 2017 he caution interviewed the accused in the iTaukei language. The witness had also translated the caution interview into the English language.
22. The witnessing officer was WPC Makelesi the accused had signed all the pages of the caution interview with the witnessing officer and the witness. Before the interview commenced the accused was fine and he did not make any complaints he was also cooperative. There was no force or any threat made to the accused before, during and after the interview and reconstruction. At the end of the interview the accused was calm.
23. The witness also stated that none of his colleagues threatened or assaulted or verbally abused the accused.
24. The defence on the other hand denies both the allegations. According to the line of cross examination, the accused takes up the position that he did not penetrate the vulva of the complainant with his fingers as alleged. The complainant who was 7 years of age at the time had caused the injuries by rubbing herself hard against the labia.
25. I accept the evidence of the complainant as truthful and reliable she was able to give a coherent account of what the accused had done to her. She was forthright in her evidence and was able to withstand cross examination as well.

26. The complainant promptly told her mother about what the accused had done to her as soon as the accused left their house since she was afraid of the accused.
27. Although the complainant did not tell her mother all the details of what the accused had done to her, however, she did disclose material and relevant information about the unlawful sexual conduct on the part of the accused. The complainant told her mother the accused had put his fingers inside her panty.
28. The evidence of the complainant's mother was relevant to the question of consistency or inconsistency of the complainant's conduct and as such going to the complainant's credibility and reliability as a witness (*see Anand Abhay Raj vs. The State, CAV 0003 of 2014 (20 August, 2014)*).
29. Defence had referred Siteri to her police statement which she had given to the police when facts were fresh in her mind. According to defence the police statement did not mention anything about the accused putting his fingers into the complainant's panty.
30. The inconsistency between what the witness told the court in evidence and the police statement is not significant.
31. This court accepts the explanation of the witness that she had told the Police Officer that the complainant had told her the accused was touching her private part.
32. In any event this witness was honest in telling the court what the complainant had told her. She was also able to withstand cross examination and was not discredited.
33. The evidence of the complainant and her mother was supported by the medical report of the complainant. Dr. Narayan had observed injuries in

the form of excoriation on the left labia known as the vulva caused by blunt force applied across the skin surface.

34. This court accepts the opinion of the doctor which was in accordance with the evidence adduced and the injuries seen by the doctor were consistent with blunt force applied to the vulva of the complainant.
35. Finally this court accepts the admissions made by the accused in his caution interview as voluntarily given on his freewill and they were the truth. I reject the assertion by the defence that the accused was assaulted by the police officers during his interview.
36. On the totality of the evidence adduced all the prosecution witnesses were reliable and credible and I have no doubt in my mind that all the prosecution witnesses told the truth in court.
37. The defence has not been able to create a reasonable doubt in the prosecution case in respect of both counts.
38. This court is satisfied beyond reasonable doubt that the accused on 24<sup>th</sup> day of June, 2017 had unlawfully and indecently assaulted the complainant by touching her thighs.
39. Furthermore this court is also satisfied beyond reasonable doubt that the accused on 24<sup>th</sup> day of June, 2017 had penetrated the vulva of the complainant with his finger.
40. I agree with the unanimous opinion of the assessors that the accused is guilty of one count of sexual assault and one count of rape.
41. In view of the above, I find the accused guilty as charged and I convict him of both counts.

42. This is the judgment of the court.



**Sunil Sharma**  
**Judge**

**At Lautoka**

24 April, 2019

**Solicitors**

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

**Office of the Legal Aid Commission for the Accused.**