

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

**Criminal Case No.: HAC 21 of 2017**

**STATE**

**V**

**S. T.**

**Counsel** : Mr. T. Tuenuku for the State.  
: Ms. A. Bilivalu for the Accused.

**Dates of Hearing** : 09 and 10 June, 2020  
**Closing Speeches** : 11 June, 2020  
**Date of Summing Up** : 12 June, 2020  
**Date of Judgment** : 15 June, 2020

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**JUDGMENT**

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*(The name of the complainant is suppressed she will be referred to as "LT" the name of the accused is also suppressed and he will be referred to as "ST")*

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

**COUNT ONE**

**[REPRESENTATIVE COUNT]**

***Statement of Offence***

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

***Particulars of Offence***

**S. T.** between the 1<sup>st</sup> day of October, 2012 and the 31<sup>st</sup> day of October, 2012 at Maururu, Ba in the Western Division, had carnal knowledge of "LT", a child under the age of 13 years.

**COUNT TWO**

**[REPRESENTATIVE COUNT]**

***Statement of Offence***

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

***Particulars of Offence***

**S. T.** between the 1<sup>st</sup> day of March, 2013 and the 31<sup>st</sup> day of March, 2013 at Vutuni, Ba in the Western Division, had carnal knowledge of "LT", without her consent.

**COUNT THREE**

**[REPRESENTATIVE COUNT]**

***Statement of Offence***

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

***Particulars of Offence***

**S. T.** between the 1<sup>st</sup> day of February, 2014 and the 31<sup>st</sup> day of October, 2014 at Vutuni, Ba in the Western Division, had carnal knowledge of "LT", without her consent.

**COUNT FOUR**

***Statement of Offence***

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

***Particulars of Offence***

**S. T.** on the 6<sup>th</sup> day of February, 2015 at Vutuni, Ba in the Western Division, had carnal knowledge of "LT", without her consent.

2. In the summing up delivered by this court the assessors were reminded that after the prosecution had closed its case, the accused had a case to answer in respect of count one, lesser count of attempt to commit rape in count two and the third count only.
3. The three assessors returned with a unanimous opinion that the accused was guilty of one count of rape and one count of attempt to commit rape and unanimously not guilty of count three.
4. The prosecution called three witnesses whereas the accused exercised his right to remain silent and did not call any witness.
5. The complainant who was 12 years of age in 2012 informed the court that the accused was her maternal uncle who has always been staying with the complainant and her family. In the absence of her father the accused was considered as the head of the family.
6. The complainant recalled the afternoon of 2<sup>nd</sup> October, 2012 she was at home with her mother, her siblings, and the accused, since she had come back from school she had her shower, did her homework and after dinner went to sleep in her bedroom.
7. There were two beds in the bedroom, on one bed the accused slept with the complainant's younger sister and on the other bed the complainant slept alone. Whilst sleeping the complainant felt that her panty was wet when she woke up she saw the accused removing her panty and then he started licking her vagina.
8. The complainant saw the accused because there was light in the room, when the complainant asked the accused what he was doing the accused blocked her mouth with one of his hand and with the other hand he took out his penis and then inserted his penis into her vagina. The complainant

was sleeping face up and the accused was beside her. The accused was able to force himself on the complainant and inserted his penis into the complainant's vagina at this time the complainant felt pain this continued for 2 to 3 hours.

9. When the accused was having sexual intercourse the complainant was scared because it was her uncle who was doing such an act on her. The complainant's mother was at home sleeping in the living room. The complainant stated that the accused continued to have sexual intercourse with her on five occasions in the month of October, 2012.
10. The complainant did not tell her parents because they wouldn't believe her she also did not tell anyone in school because she didn't trust anyone, she was waiting for someone who would trust her so that she could tell that person.
11. In March, 2013 the complainant was staying at Maururu with her aunt (accused wife), the accused and her younger sister. The complainant's mother had gone to Natawarau to be with the complainant's father.
12. One night when the complainant was sleeping in the bedroom she felt her panty was being removed when she woke up she saw it was the accused. She told the accused not to do anything to her but the accused did not stop he licked her vagina, and sucked her breast and when the accused tried to take out his penis the complainant stopped the accused from doing anything further.
13. The accused responded by saying "*this is why girls are being raped.*" The accused tried to insert his penis into her vagina but could not. The complainant did not do anything because of the accused's age.

14. In February, 2014 the complainant and her younger sister were living with the accused and his wife at Vutuni since her mother and her brother had gone to Natawarau. In the night when the complainant was sleeping she felt someone lift her leg when she woke up she saw the accused she told the accused not to do anything to her after that he went to lie down and did not do anything else.
15. The complainant told her teacher about what her uncle was doing to her when questioned by her school teacher. The complainant did not tell anyone at home about what the accused had done to her since she was afraid to tell them.
16. In cross examination the complainant revealed that in 2013 the accused had tried to penetrate her vagina with his penis on two occasions but in 2014 he had inserted his penis into her vagina once during the night when her aunt and her younger sister had gone to a cousins house. The accused had told the complainant not to tell anyone about what he was doing to her.
17. Amalaini Vakatale in the year 2014 was the complainant's school teacher she stated that the complainant was not focused in learning during teaching time she would be day dreaming and not be attentive to what was taught. From her observations, the witness realised that something was wrong and that the complainant was also pale in her appearance. The witness noticed that the complainant was ignored by her peers and this got her concerned as well.
18. As time went by the witness was able to gain the trust of the complainant and on one occasion she asked the complainant if she has been harassed or whether her uncle had massaged her stomach. The complainant started to cry and relayed to her that in February 2015 the accused had pulled up her

top and was massaging her stomach and had also made love to her when she was staying with the accused at Vutuni.

19. The witness further stated that the complainant had relayed to her what the accused was saying to her when he was doing these acts:

*“There are so many things happening to girls right now like teenage pregnancies so it is better for me to do this to you.”*

20. The witness consoled the complainant because she was crying and then reported the matter to the Head Teacher.

21. Dr. Sapeta Taito on 9<sup>th</sup> March, 2015 had examined the complainant at the Ba Mission Hospital. The specific medical findings of the doctor were:

- (a) No lacerations or bruises were seen around the genital area;
- (b) White thick PV discharge seen around vaginal area which was due to a bacterial infection;
- (c) Hymen not intact (no reflection with light and no resistance on vaginal examination).

22. In the opinion of the doctor she did not see any hymen and therefore she could not determine the onset of assault which meant she could not tell why there was no hymen.

23. From the line of cross examination the defence took the position that the accused did not commit the offences as alleged. The accused did not rape the complainant by penetrating the vagina of the complainant with his penis in 2012 and 2014 or had attempted to rape the complainant in 2013.

24. The defence also contended that the evidence of the complainant was not probable in the circumstances as narrated by her and therefore she should not be believed. The accused was an elderly person who was considered as the head of the family who had looked after and maintained the complainant throughout the time they were living under one roof. The medical report also does not connect the accused to the allegations since there are many reasons why the hymen of the complainant was not intact.
25. Taking into consideration the evidence adduced by the prosecution I accept the evidence of the complainant as reliable and truthful. Although the complainant was taking time to answer questions on some occasions I accept this to be natural since there has been considerable lapse of time from the date of the first incident (about 8 years ago).
26. Despite the passage of time the complainant was able to remember what the accused had done to her. I accept the evidence of the complainant in respect of count one that the accused had forceful sexual intercourse with her on five different occasions between the 1<sup>st</sup> day of October, 2012 and the 31<sup>st</sup> day of October, 2012. At this time the complainant was 12 years of age.
27. I also accept the evidence of the complainant that between the 1<sup>st</sup> March, 2013 and the 31<sup>st</sup> day of March, 2013 the accused had attempted to penetrate the complainant's vagina with his penis on two occasions.
28. The complainant had given a coherent account of what the accused had done to her in respect of the above incidents. The demeanour of the complainant was consistent with her honesty. She was able to withstand cross examination and was not discredited.
29. In respect of the third count the complainant in her evidence stated that the accused had on one occasion lifted her leg whilst she was sleeping on her

bed. The accused when confronted and/or told by the complainant not to do anything went away. It was in cross examination that the complainant stated that the accused had inserted his penis into her vagina in 2014.

30. I accept the complainant told whatever had happened to her in her evidence in chief when she stated that in 2014 the accused had inserted his penis into her vagina was in my view a spontaneous reaction when questioned by the defence counsel. It was a response by the complainant without any thought or consideration. On this basis I do not give any weight to the response of the complainant in her cross examination and/ or re-examination. The complainant told the truth during her evidence in chief.
31. The complainant was also scared of the accused who was considered as the head of the house in the absence of her father. It was obvious that the complainant was unable to understand what was happening to her considering her age at the time and the fact that she did not trust anyone and the pre conceived mindset that no one would believe her led her to keep whatever that was happening to her within her own self. The complainant's situation was aggravated by the fact that she was ignored by her peers hence the delay in telling anyone about her problems.
32. The complainant only told her teacher Amalaini Vakatale about what the accused was doing to her after there was a relationship of trust that had developed between the complainant and her teacher over a period of time.
33. Amalaini was referred to her police statement on two occasions to show inconsistency between her evidence and her police statement. In my considered view the inconsistency was not significant to adversely affect her credibility. I accept this witness explanation that it was the first time she had been in contact with the police in respect of such a case so what she had told the police officer was written and it just slipped her mind to tell the officer everything in detail since she was thinking about the complainant



and what she was going through. I accept the witness told everything the complainant had told her.

34. I also accept the evidence of Amalaini as reliable and truthful. I found this witness to be an honest and a concerned teacher who narrated what the complainant had told her. This witness gave a true account of what the complainant had told her. I have no doubt in my mind that all the prosecution witnesses had told the truth in court. The fact that the complainant did not shout or yell or struggle with the accused or tell anyone does not affect the complainant's credibility.
35. This court rejects the defence of the accused as implausible and untenable on the totality of the evidence.
36. The defence has not been able to create any reasonable doubt in the prosecution case in respect of counts one and two.
37. This court is satisfied beyond reasonable doubt that the accused between the 1<sup>st</sup> day of October, 2012 and the 31<sup>st</sup> day of October, 2012 had forceful sexual intercourse with the complainant a child under the age of 13 years.
38. This court is also satisfied beyond reasonable doubt that the accused between the 1<sup>st</sup> day of March, 2013 and the 31<sup>st</sup> day of March, 2013 had attempted to have sexual intercourse with the complainant. On the evidence before the court what the accused did went beyond mere preparation to commit the offence of rape.
39. This court is also satisfied beyond reasonable doubt that the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

40. I agree with the unanimous opinion of the assessors that the accused is guilty of one count rape and one count of attempt to commit rape. I also agree with the unanimous opinion of the assessors that the accused is not guilty of count three. This court has already found the accused did not have a case to answer in respect of count four.
41. In view of the above, the accused is convicted for one representative count of rape and one representative count of attempt to commit rape and is acquitted of counts three and four.
42. This is the judgment of the court.



**Sunil Sharma**  
**Judge**

**At Lautoka**

15 June, 2020

**Solicitors**

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

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