

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

**Criminal Case No.: HAC 67 of 2019**

**STATE**

**V**

**TIMOCI VUKI DAWAI**

**Counsel** : Mr. S. Seruvatu for the State.  
: Ms. K. Vulimainadave [LAC] for the Accused.

**Date of Hearing** : 16 September, 2020  
**Closing Speeches** : 18 September, 2020  
**Date of Summing Up** : 18 September, 2020  
**Date of Judgment** : 21 September, 2020

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**JUDGMENT**

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*(The names of the complainants are suppressed they will be referred to as "SM" and "AD" respectively.)*

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

**FIRST COUNT**

**(Representative Count)**

***Statement of Offence***

**RAPE**: Contrary to section 149 and 150 of the Penal Code, Cap 17.

### ***Particulars of Offence***

**TIMOCI VUKI DAWAI** between the 1<sup>st</sup> day of January, 2008, and the 31<sup>st</sup> day of December, 2008 at Nadi in the Western Division, had unlawful carnal knowledge of “SM” without her consent.

### **SECOND COUNT**

#### ***Statement of Offence***

**INDECENT ASSAULT**: Contrary to section 212(1) of the Crimes Act 2009.

#### ***Particulars of Offence***

**TIMOCI VUKI DAWAI** on the 21<sup>st</sup> of March, 2019 at Nadi in the Western Division, unlawfully and indecently assaulted “AD”.

2. The three assessors returned with unanimous opinion that the accused was guilty of one representative count of rape and one count of indecent assault as charged.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called both the complainants whereas the accused exercised his right to remain silent and did not call any witness.
5. The first complainant “SM” informed the court that the accused is her biological father and she is the eldest of the 7 siblings. In the year 2008 she was 11 years of age and a class 6 student. In 2008 her father started touching her and also had forceful sexual intercourse with her on two occasions.
6. In respect of the first incident the accused called the complainant from his bedroom, when she went inside the bedroom the accused started touching her and then he removed her clothes. When she was lying on the bed, the

accused came on top of her and forcefully penetrated her vagina with his penis. This incident happened during the day time when her mother was at work.

7. In respect of the second incident it was night time the complainant was sleeping in the sitting room with her siblings when the accused woke her and told her to sleep in the corner.
8. In the corner the accused started touching her she tried to push the hand of the accused away but he was forceful. Thereafter, the accused removed her clothes and forcefully penetrated her vagina with his penis and had sexual intercourse with her.
9. At this time the complainant's mother was at work the complainant went to sleep crying. The complainant did not tell her mother about both the incidents because she was scared and she always thought about her younger siblings and at that time her youngest brother was born. The complainant did not consent to what the accused had done to her.
10. The second complainant "AD" informed the court that in March 2019, she had knocked off from work at about 11pm. The staff bus left at about 11.30pm when she reached town on her way home she met her father, the accused. While walking the accused put his right hand around her shoulder when they reached the front door of the house, she felt the accused right hand around her shoulder coming down into her breast and his left hand going on to her stomach.
11. At this time the accused was kissing her neck and he said "*you always hurt my feelings*". He was breathing heavily on her neck the complainant wanted to shout but she did not want to wake up the kids. She was so scared that she forgot the house door was locked on the outside and that she started banging the door.

12. The next day the complainant went to town with her elder sister "SM" and she told her sister about what the accused had done to her the previous night.
13. The incidents were reported to the police, the accused was arrested, caution interviewed and charged.
14. On the other hand, the defence states the allegation is a made up story, in respect of the first complainant the defence contention is that the allegation dates back to 2008 which was only reported in 2019 after about 11 years. The first complainant was not under any threat by the accused she was a "free person" who could have told her friends or her relatives or her mother if the accused had indeed raped her as alleged. The complainant could have shouted or resisted the accused but she did not.
15. In respect of the second allegation by the first complainant the defence also says this cannot be believed because the complainant was sleeping in the sitting room with her siblings so if the accused had unlawful sexual intercourse as stated by the complainant it cannot be possible since the complainant had all the opportunity to alert her siblings sleeping beside her. The complainant did not since nothing had happened.
16. Furthermore, the first complainant on her own freewill had visited the accused at the cell block and the remand centre and had wanted to withdraw her complaint because nothing had happened. If indeed the allegations were true the complainant would have told someone.
17. In respect of the second complainant "AD" the defence says the accused was a concerned father who had always waited for his daughter in the middle of the night when she returned from work. If the accused had indeed done what this complainant had told the court then the complainant would have woken her other siblings and/or shouted to alert the neighbours.

18. Considering the evidence adduced by the prosecution and line of defence put forward by the defence I accept the evidence of both the complainants as truthful and reliable. Despite the lapse of time the first complainant was forthright and coherent about what the accused had done to her some 11 years ago in the year 2008.
19. This complainant was able to withstand cross examination and she was not discredited. Her demeanour was consistent with her honesty. I have no doubt in my mind that the first complainant told the truth in court.
20. In respect of the delay in reporting (although a considerable time had lapsed) this in my view was beyond the control of the complainant. She was 11 years of age at the time of the alleged incidents and the fact that the future of her younger siblings was at stake this delay was inevitable. The complainant "SM" was the eldest child of the accused and no doubt she was caught in between her father and her siblings/family at such a young age the complainant had lots of responsibilities to shoulder.
21. The delay in reporting does not in my view affect the credibility of this complainant, she only got the courage to report the matter when she was told by her younger sister "AD" about what the accused had done to her.
22. Furthermore, I reject the defence suggestion that nothing had happened because this complainant had intended to withdraw her complaint against the accused. In effect, it was the compelling circumstances of the complainant that had led her to inform the accused about the withdrawal of her complaint. She was looking after her younger siblings without any parental support since her mother was in Australia and the accused was in remand. I accept that this was the only reason why this complainant had wanted to withdraw her complaint.

23. I also found the second complainant to be honest and believable she was also able to give a clear narration of what the accused had done to her. I reject the defence suggestion that this witness had any motivation to implicate the accused falsely because she was scolded by the accused for coming late from work. This witness was close to the accused and had a good relationship with him. In any event this witness was straight forward and forthright she was also not discredited in cross examination.
24. Both the prosecution witnesses were believable who told the truth in court they had a good relationship with the accused who was their biological father and I do not see any iota of motivation on both the complainants to falsely implicate the accused.
25. On the other hand, this court rejects the defence of denial as untenable and implausible considering the totality of the evidence. The defence has not been able to create a reasonable doubt in the prosecution case.
26. This court is satisfied beyond reasonable doubt that the accused between the 1<sup>st</sup> day of January, 2008 and the 31<sup>st</sup> day of December, 2008 had unlawful carnal knowledge of “SM” without her consent.
27. This court is also satisfied beyond reasonable doubt that the accused knew or believed that the complainant was not consenting or didn’t care if she was not consenting at the time.
28. This court is also satisfied that the accused in March, 2019 had unlawfully and indecently assaulted “AD” by touching her breasts, stomach and kissing her neck.
29. This court agrees with the unanimous opinion of the assessors that the accused is guilty of one representative count of rape and one count of indecent assault as per the amended information filed herein. On the

evidence before the court it was open to the assessors to reach the opinion they have arrived at.

30. In view of the above, I find the accused guilty of one representative count of rape and one count of indecent assault as charged.
31. This is the judgment of the court.
32. Moreover, for completeness on 14<sup>th</sup> September, 2020 the accused had pleaded guilty to one count of indecent assault in the presence of his counsel as per the following information filed by the Director of Public Prosecutions dated 19<sup>th</sup> September, 2019:

**(Representative Count)**

***Statement of Offence***

**INDECENT ASSAULT:** Contrary to section 154(1) of the Penal Code, Cap 17.

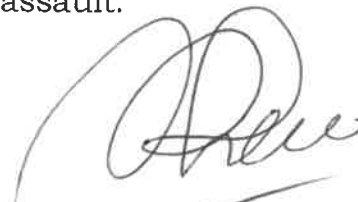
***Particulars of Offence***

**TIMOCI VUKI DAWAI** between the 1<sup>st</sup> day of January, 2008 and the 31<sup>st</sup> day of December, 2008 at Nadi, in the Western Division, unlawfully and indecently assaulted “SM” by touching her breast and her vagina.

33. The brief summary of facts admitted by the accused was as follows:

Between 1<sup>st</sup> January, 2008 and the 31<sup>st</sup> December, 2008 at night the complainant “SM” would sleep in the sitting room with her other siblings. The accused would come and lie next the complainant and touch her breast and slowly put his hand inside her panty and touch her vagina. The accused continued with this act on a number of occasions throughout 2008, on all these occasions the complainant’s her mother was not at home.

34. On 15<sup>th</sup> September, 2020 upon considering the summary of facts read by the state counsel which was admitted by the accused in the presence of his counsel and upon reading his caution interview dated 25<sup>th</sup> March, 2019 this court was satisfied that the accused had entered an unequivocal plea of guilty on his own freewill. This court was also satisfied that the accused had fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted by the accused also satisfied all the elements of the offence of indecent assault which was a representative count.
35. In view of the above, this court found the accused guilty and convicted him for one representative count of indecent assault.



**Sunil Sharma**  
**Judge**

**At Lautoka**

21 September, 2020

**Solicitors**

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

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