

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 002 of 2021

STATE

V

JOSAIA RACEVUA

Counsel : Ms. S. Naibe for the State.
: Ms. S. Ali for the Accused.

Dates of Hearing : 29, 30 June, 01 July, 2022
Closing Speeches : 04 July, 2022
Date of Judgment : 05 July, 2022

JUDGMENT

(The name of the complainants are suppressed they will be referred to as "M.L" and "R.T" respectively)

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

FIRST COUNT

Statement of Offence

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

Particulars of Offence

JOSAIA RACEVUA, on the 12th day of December, 2020 at Nukuloa, Rakiraki in the Western Division, penetrated the anus of “M.L”, a child under the age of 13 years, with his finger.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

JOSAIA RACEVUA, on the 12th day of December, 2020 at Nukuloa, Rakiraki in the Western Division, had carnal knowledge of “ML”, a child under the age of 13 years.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

JOSAIA RACEVUA, on the 12th day of December, 2020 at Nukuloa, Rakiraki in the Western Division, penetrated the vagina of “RT”, a child under the age of 13 years, with his finger.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

JOSAIA RACEVUA, on the 12th day of December, 2020 at Nukuloa, Rakiraki in the Western Division, had carnal knowledge of “RT”, a child under the age of 13 years.

2. In this trial, the prosecution called eight witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer as follows:
 - a) Count one – Sexual Assault;
 - b) Count two - Rape;
 - c) Count three – Rape; and
 - d) Count four – Sexual Assault.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.
4. The accused is charged with four counts, and there are two complainants. The evidence in respect of each count and each complainant will be considered separately from the other if the accused is guilty of one count, it does not mean that he is guilty of the other count as well. This also applies with the findings of not guilty.

ELEMENTS OF THE OFFENCE

5. To prove counts one and four the prosecution must prove the following elements of the offences of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted both the complainants by inserting his penis on their backside.
6. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offences.
7. The words “unlawfully” and “indecently” in respect of the second element of the offences of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
8. The final element of assault is the unlawful use of force on both the complainants by inserting his penis on their backside.

The following is kept in mind:

- (a) whether the force which was used in inserting his penis on their backside was sexual in nature; and
 - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
9. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offences of sexual assault as explained above, then this court must find the accused guilty of both the offences of

sexual assault. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences of sexual assault, then this court must find the accused not guilty of both or either of the counts.

10. In this trial, the accused has denied committing the offences of sexual assault he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted both the complainants by inserting his penis on their backside.
11. To prove counts two and three the prosecution must prove the following elements of the offences of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of both the complainants with his penis and his fingers as per each count;
 - (c) Both the complainant's were below the age of 13 years.
12. The slightest of penetration of both the complainants vagina by the accused's penis or fingers is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case, the first complainant was 10 years and the second complainant 7 years at the time of the alleged offending and therefore the consent of both the complainants is not an issue in regards to both counts.
13. The first element of the offence is concerned with the identity of the person who allegedly committed the offences.
14. The second element is the act of penetration of the complainants vagina with the penis and fingers respectively.

15. The final element of the offences is the age of both the complainants. It is an undisputed fact that the first complainant was 10 years and the second complainant was 7 years in 2020 which establishes that they were both below the age of 13 years at the time of the alleged incidents.
16. In this trial, the accused has denied committing the offences of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainants with his penis or fingers as mentioned in the information.
17. This court must be satisfied that the prosecution has proved all the elements of the offences of rape beyond reasonable doubt in order for this court to find the accused guilty of these counts. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences, then this court must find the accused not guilty of both or either of the counts.
18. Furthermore, the law also provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence.
19. I have directed myself in respect of count two that if the accused is not guilty of rape then I should consider the lesser offence of attempted rape. To prove the offence of attempt to commit rape the prosecution must prove the following elements of this offence beyond reasonable doubt:
 - (a) The accused;
 - (b) Attempted to penetrate the vagina of the complainant "M.L" with his penis.

20. In this trial the accused has denied committing the offence of attempt to commit rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had attempted to penetrate the vagina of the complainant with his penis.
21. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
22. The second element is the attempt to penetrate the complainant's vagina by the penis. This element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental.
23. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental. For the accused to be guilty of attempted rape, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.
24. This court will have to look at the conduct of the first complainant and the accused at the time and the surrounding circumstances to decide this issue.
25. Before the accused can be found guilty this court must be satisfied beyond reasonable doubt of two things:-
 - (a) Firstly that the accused intended to penetrate the vagina of the complainant with his penis;
 - (b) Secondly with that intention the accused did something which was more than mere preparation for committing that offence.

26. In this case, the prosecution is alleging that the accused intended to penetrate the vagina of the first complainant with his penis. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. This court will have to decide intention by considering what the accused did, by looking at his actions before, at the time of, and after the act.
27. The accused has denied committing the offence of attempted rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to penetrate the first complainant's vagina with his penis and with that intention he did something which was more than merely preparatory.
28. The prosecution says when the first complainant was sleeping on the mattress in the house of the accused, after removing the complainant's panty the accused went towards the complainant and tried to penetrate her vagina with his penis.
29. If the above is accepted by this court that the accused did this, then it is for the court to decide whether what the accused did went beyond mere preparation. In other words, did he actually intend to commit the offence of rape, in which case he is guilty of attempting to commit rape, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.
30. If this court is satisfied that the prosecution has proved all the above elements beyond reasonable doubt then the accused is guilty of attempt to commit rape.

31. If on the other hand, this court finds that the prosecution has failed to prove any of these elements beyond reasonable doubt then this court must find the accused not guilty of attempt to commit rape.
32. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainants to be corroborated. This means, if this court is satisfied with the evidence given by either or both the complainants and accept it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainants.

ADMITTED FACTS

33. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
34. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

35. The prosecution called eight witnesses to prove its case against the accused.
36. The first complainant informed the court that she was at home when the accused who she calls Ta Jo waved at her and her younger sister "R.T" to come to his house. Both went to the house of the accused and lay down

on the mattress which was on the floor while the accused went to lie on his bed.

37. After a while the complainant felt something heavy on her back. When she turned the accused was lying on her and he was inserting his penis on her backside. He then hugged her and touched her thighs, at this time the accused used his hand and was poking her “meme” meaning her vagina and wanted to insert his penis into her vagina.
38. The complainant wanted to go outside so the accused released her. When outside she wore her panty, went home and told her father about what the accused had done to her.
39. In cross examination the complainant stated that the accused lived about 20 meters from her house. The complainant agreed the accused had asked her and her younger sister to sleep on the mattress. Her sister was lying about 3 meters away from her. When the accused was lying beside her she tried to move away from him. The complainant maintained that whatever she told the court was correct.
40. Before the second complainant gave evidence a competency test was undertaken to ascertain whether she was able to understand the meaning of oath and be able to give sworn evidence due to her age. The competency test was done in accordance with section 117 of the Criminal Procedure Act. On the basis of the age of the complainant (8 years) this court ruled that the complainant give unsworn evidence.
41. The second complainant informed the court that she is a year 3 student, she was outside her house when the accused who she calls Ta Jo waved at her to come to his house. The complainant and her sister “M.L” went to his house a mattress was on the floor both sisters went and lay on the

mattress. After a while the accused came behind her and was poking her vagina with his hand which was painful and she started to cry. The complainant called her elder sister to pull her away from the accused. The accused gave her 20 cents she came outside the house and wore her panty. Thereafter both sisters went home and told their father and later their mother about what the accused had done.

42. In cross examination, the complainant agreed when the accused was touching her vagina she called her elder sister who tried to pull her away from the accused. According to the complainant the accused also did something to her elder sister. The reason why she had gone into the house after going outside was to wait for her elder sister. The complainant maintained that whatever she told the court was the truth that the accused had poked her vagina with his hand.

43. Laisenia Bure informed the court that both the complainants are his daughters. On 12th December, 2020 at about 2pm he called his two daughters to come home since they were at the house of the accused. As soon as they came home the second complainant informed him that the accused had put his penis at her backside and was poking his finger into her vagina. Upon hearing this, the witness was shocked he could not believe what he heard. The witness called the first complainant and asked her if the accused had done something to her. "M.L" told him that the accused tried to put his penis and finger into her vagina. According to both the complainants it was painful and they cried after this the accused gave them money.

44. The mother of the complainants was not at home but in Suva so when she returned home after a few days the witness told his wife about what their

daughters had told him. The mother of the complainant called both the complainants and spoke with them.

45. In the presence of the witness, both complainants told their mother what the accused had done to them. The accused and the witness are distant cousins.
46. In cross examination, the witness stated that after he was told by his daughters about what had happened he did not ask the accused or confront him.
47. The mother of both the complainants Vasiti Saqailati informed the court that in the year 2020 the accused had done something to her daughters "M.L." and "R.T". When the incidents happened she was in Suva, when she arrived home she asked both her daughters about what had happened to them on Saturday. They told the witness the accused had waved to them to come to his house. He had put the mattress on the floor and told them to lie on it. They were lying on the mattress while the accused was on the bed.
48. Both the complainants went to sleep after a while when the second complainant looked around she saw the accused lying beside her naked. The accused put his penis at the backside of the second complainant at this time she turned upwards and the accused put this finger inside the second complainant's vagina.
49. The second complainant felt pain and she started to cry because the finger was inside her vagina. Before inserting his finger the accused had pulled down the pants of this complainant. After the accused saw the complainant crying he stood up got his wallet and gave her 20 cents.

50. Thereafter the matter was reported to the police.

RECENT COMPLAINT DIRECTION

51. Complainant's of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
52. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that both the complainants told their father immediately after about what the accused had done to them. The second complainant informed her father that the accused had put his penis at her backside and was poking his finger into her vagina. The first complainant informed her father that the accused tried to put his penis and finger into her vagina. When the mother of the complainants came home both the complainants told their mother about what the accused had done to them.
53. Both the complainants told their mother more or less what they had told their father. However, it was the second complainant who told her mother that when she turned around on the mattress she saw the accused lying beside her naked. The accused put his penis at her backside and also put his finger inside her vagina after her panty was removed.
54. This is commonly known as recent complaint evidence. The evidence given by Laisenia Bure and Vasiti Saqailati is not evidence of what actually

happened between both the complainants and the accused since they were not present and they did not see what had happened between them.

55. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether both the complainants are credible witnesses. The prosecution says both the complainants told their father about what the accused had done to them immediately after the incidents and to their mother after she returned home from Suva.
56. The prosecution is asking this court to consider the age of the complainants and the fact that they relayed relevant and important information about the conduct of the accused first to their father and then to their mother when she came home from Suva after a few days of the incidents and therefore they are more likely to be truthful.
57. On the other hand, the defence says both the complainants had made up a story against the accused they gave one version to their father and another to their mother and then a completely different version in their evidence. In fact the complainants mother did not make any specific reference to what the first complainant had told her. She only specifically mentioned about what the second complainant had told her. The defence also states that this court should consider that there are three different versions before the court which shows the complainants were making up a story and therefore they should not be believed.
58. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in both the complainants conduct goes to their credibility and reliability as witnesses. It is for this court to decide whether the complainants are reliable and credible. The real question is whether the

complainants were consistent and credible in their conduct and in their explanation of it.

59. The fifth witness DC 3354 Amani Waqetia informed the court that on 22nd December, 2020 he had charged the accused at the Rakiraki Police Station. The charge was conducted by the use of a computer in the Itaukei language. The witness had also translated the charge in the English language. The charge in the Itaukei language was marked and tendered as prosecution exhibit no. 1 (A) and the English translation as 1 (B).
60. According to the witness there was no witnessing officer present, it was only the accused and him during the charge. Before the charge the accused was confident and comfortable and the witness had conversed with the accused in their own dialect.
61. The accused did not complain of anything he was given his right to consult a solicitor of his own choice and also given all his Constitutional Rights which the accused did not wish to exercise.
62. The accused made a statement at Q.12 in the following words: *“I would like to say that I admitted of committing the offence and I would like to ask for forgiveness.”*
63. There was no force or threat or promises made to the accused to make a statement or sign the charge. The accused was not physically or verbally threatened or abused by anyone.
64. In cross examination, the witness agreed that the accused was not given the right to consult a legal aid counsel.

65. The sixth witness Acting Inspector 3033 Nacanieli Dralivi informed the court that he was the investigating as well as the interviewing officer in this case. As part of his role as the investigating officer the witness had uplifted the birth certificates of both complainants from the office of Births, Deaths and Marriages. The birth certificates of both the complainants were marked and tendered as prosecution exhibit 2(A) and 2(B).
66. Furthermore, the witness had caution interviewed the accused on 21st December, 2020 at the Crime Office of the Rakiraki Police Station by the use of a computer in the Itaukei language and he had also translated the interview in English. The caution interview of the accused dated 21st December, 2020 and the English translation were marked and tendered as prosecution exhibit 3(A) and 3(B).
67. The witnessing officer was Acting Corporal Joape, before the commencement of the interview the witness did not see any injuries on the accused and there was no complaint of any sickness or injuries by the accused. According to the witness the accused was okay and fit, he was cooperative and answering questions voluntarily. There was no assault or threat on the accused, he was given all his Constitutional Rights including the right to remain silent.
68. The accused was given sufficient breaks during the interview and there was a reconstruction of the crime scene as well. The witness did not force the accused to make a statement or admit the offences alleged or make any false promises to the accused. Furthermore, the accused was not ill-treated by anyone.

69. In cross examination, the witness denied that the accused had made admissions because he was forced or pressured or assaulted or threatened by the witnessing officer and the witness. The witness denied that the accused had not given the answers voluntarily and that he was threatened during the breaks to admit the allegations.
70. The seventh witness Cpl. 3691 Joape Qio informed the court that he was the witnessing officer during the caution interview of the accused. The witness was present with the accused and the interviewing officer. The interview was typed by the use of a computer after the documents were printed it was checked by the accused before signing. The interview was conducted in the Itaukei language everyone present signed all the pages of the interview.
71. Before the interview commenced the accused did not complain about anything the witness did not notice or see any injuries on the accused. There was no force, threat or pressure on the accused to admit to the allegations by anyone including the witness. The accused was given sufficient breaks and all his Constitutional Rights. The accused gave all the answers on his freewill and also signed the interview.
72. In cross examination, the witness denied that he and the interviewing officer had forced the accused to admit the allegations in the caution interview. The accused was not threatened by anyone during the break and there was no assault on him to admit the allegations and the answers were given voluntarily.

CAUTION INTERVIEW AND CHARGE STATEMENT

73. The answers in the caution interview and the statement in the charge are for this court to consider as evidence but before the admissions are

accepted, this court must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for this court to accept or reject the answers given in the caution interview and the charge.

74. It is for this court to decide whether the accused made those admissions and whether those admissions are the truth. If this court is not sure whether the accused made the admissions in his caution interview and the charge then those admissions will be disregarded. If this court is satisfied that those admissions were made by the accused, then this court should consider whether those admissions are the truth. What weight is to be given to those admissions is a matter entirely for this court.
75. The final witness Dr. Ilisapeci Adi Tabua informed the court that she graduated with an MBBS degree from the University of Fiji in the year 2017. In 2018 she completed her internship at the Lautoka Hospital and since 2019 the witness is based at the Rakiraki District Hospital.
76. On 15th December, 2020 the witness had examined both the complainants and recorded her findings in the Fiji Police Medical Examination Forms. The Fiji Police Medical Examination Forms of both the complainants were marked and tendered as prosecution exhibit 4(A) and 4(B).
77. The specific medical findings of the first complainant were that her hymen was not intact and there was redness around her labia minora which was part of the female genitalia which according to the witness was abnormal.
78. The witness further stated that if there was some form of penetration it would have perforated the hymen and it could cause redness as seen around the labia minora but there was no form of penetration through the vagina.

79. The injuries were about 3 to 4 days old. In respect of the redness around the labia minora the possibility is when force is used against a sensitive surface damage to the surface can cause redness.
80. For the second complainant the witness stated that she noted some redness in the labia minora with some sores noted at the posterior fourchette of the genitalia and the hymen was not intact. This could have been caused by forceful trauma. According to the witness, hymen not been visual was abnormal for a 7 year old. The injuries were about 3 to 4 days old. For easy illustration the witness had drawn a diagram at appendix 1.
81. In cross examination, the witness agreed that improper hygiene, itchiness and scratch could lead to redness as well and that there were no injuries noted on the anal area of both the complainants.

DIRECTION ON EXPERT EVIDENCE

82. This court has heard the evidence of Dr. Tabua who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called the medical reports of both the complainants are before this court and what the doctor said in her evidence as a whole is to assist this court.
83. An expert witness is entitled to express an opinion in respect of his or her findings. When coming to my conclusion about this aspect of the case I have borne in mind that if, having given the matter careful consideration, I do not accept the evidence of the expert I do not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.

84. I have also kept in mind that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to me in reaching my decision, I must reach my decision having considered the whole of the evidence.
85. This was the prosecution case.

DEFENCE CASE

86. At the end of the prosecution the accused was given his options. The accused chose to remain silent and he did not call any witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent and did not call any witness.
87. From the line of cross examination the defence took the position that both the complainants gave an incorrect and untruthful account of what had happened that day. The accused did not call the complainants to his house and therefore he did not do anything to both the complainants as alleged. Each complainant gave a version in court which is not only impossible but they do not make sense thus making it obvious that the complainants did not tell the truth.
88. The evidence of the doctor supports the contention of the defence that there were no injuries noted and/or seen in the anus of both the complainants and yet the first complainant told the court that the accused was penetrating her backside with his penis. The answers given by the doctor is worth considering in particular that the reddening seen in the labia minora around the vagina of the complainants could have been from other causes such as improper hygiene, scratching etc.
89. Finally, the defence is also asking this court not to give any weight to the admissions in the caution interview and the charge statement of the

accused which was obtained by police officers due to force, pressure and assault. The accused did not give the admissions voluntarily and therefore no weight should be given by this court.

90. This was the defence case.

ANALYSIS

91. The prosecution alleges that both the complainants and the accused are known to each other. The accused is the uncle of the complainants and they were living in the same neighbourhood. In the year 2020 the first complainant was 10 years and the second complainant was 7 years of age.

92. On 12th December, 2020 at about 2pm the accused had waved to the complainants who were at their home to come to his house. At the house of the accused they were told to sleep on the mattress which was placed on the floor whilst the accused lay on his bed.

93. After sometime, the accused went on to the mattress where the complainants were sleeping. The first complainant felt something heavy on her back when she turned she saw the accused who was inserting his penis on her backside. He then hugged and touched her thighs and at the same time he was poking her vagina with his hand and wanted to insert his penis into her vagina. After the complainant was released by the accused the complainant went outside wore her panty went home and told her father about what the accused had done to her.

94. In respect of the second complainant the accused went behind her and poked her vagina with his finger since it was painful the complainant started to cry at this time the accused gave her 20 cents. The complainant

went outside wore her panty and went home. At home she told her father about what the accused had done to her.

95. Since both the complainants mother was not at home and upon her return after a few days the complainants also told her about what had happened to them. The matter was reported to the police and both complainants were medically examined by a doctor on 15th December, 2020. In the opinion of the doctor the injuries sustained on both the complainants upon vaginal examination revealed the hymen was not intact and redness on the labia minora which is part of the vagina to be 3 to 4 days old which would have been caused by the use of force.
96. The accused was caution interviewed wherein he voluntarily made admissions. Furthermore, the accused also made a statement voluntarily during his charge admitting the offences committed and sought forgiveness.
97. On the other hand, the defence says the allegations are a made up, incorrect and a false story narrated in court by both the complainants. A close scrutiny of the evidence given by both the complainants do not make sense, it is not clear how the accused could have abused both the complainants in the manner described by both the complainants. The first complainant's evidence is that the accused was lying on her and inserting his penis on her backside yet there is no evidence of any injuries on the anus or the anal area.
98. The second complainant told the court that the accused came behind her and was poking her vagina with his finger which made her cry. She called out to her elder sister to pull her away from the accused and after wearing her panty both the complainants then went home together cannot be true when compared with the evidence of the first complainant.

99. Defence submits that the accused never called the complainants to his house and therefore he did not do anything to the complainants. It does not make sense that both complainants were present together and had undergone a somewhat similar experience in the presence of each other. The evidence of the second complainant that the first complainant came and pulled her away from the accused cannot be believed when the first complainant told the court that she left the accused house and went home.
100. The doctor's opinion and the medical reports of both the complainants does not connect the accused in respect of the hymen not been intact and most of all the redness on the labia minora can be due to other causes such as hygiene and scratching the area concerned.
101. The admissions in the caution interview and the charge statement was not given by the accused on his freewill or voluntarily he was forced, pressured and assaulted by the police officers to make the admissions. In respect of the admissions in the caution interview the accused was assaulted during the breaks hence his admissions came about when the interview recommenced. In the charge the accused was not given his right to consult a legal aid lawyer.
102. The defence is asking this court not to give any weight to the evidence of all the prosecution witnesses. The complainants parents did not question their daughters with a view to ascertain the truth of what they were told.
103. Finally, the complainants gave different versions to their father and mother which is another reason why they should not be believed. The medical report of the complainant is not conclusive since there are other possibilities why the hymen was not intact and for the reddening around the labia minora.

DETERMINATION

104. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
105. In this case there are two complainants who were 10 and 7 years of age at the time of the allegations. From my observations the first complainant was a bold witness who was not shying away from answering the questions asked. She was able to express herself clearly on what she wanted to tell the court. The second complainant on the other hand was shy and a bit reserved in court, however, she was able to relate clearly what she wanted to say. Both complainants were able to understand the questions asked and answered them properly. Considering the age of the second complainant a competency test was undertaken in accordance with section 117 of the Criminal Procedure Act and this court had ruled that this complainant give unsworn evidence.
106. After carefully considering the evidence adduced by the prosecution and the line of defence put forward by the accused, I accept the evidence of both the complainants as truthful and reliable. Both the complainants gave a coherent account of what had happened to them, they were also able to withstand cross examination and were not discredited.
107. I did notice that both the complainants were able to answer questions in cross examination in a straight forward manner and were not evasive. In my view both the complainants gave an honest narration of what had happened to them.

108. I have no doubt in my mind that both the complainants told the truth in court their demeanour was consistent with their honesty. The complainants were consistent in their evidence and were able to recall what the accused had done to them. Moreover, there was no motivation raised by the accused on the complainants to frame him.
109. I do accept that both the complainants told their father and thereafter their mother when she returned from Suva about what the accused had done to them although different to what they told the court does not affect the credibility of both the complainants. Although the mother of the complainants did not say anything specifically about what the first complainant told her I accept that the complainants were able to tell their parents about what the accused had done to them.
110. The complainants were able to alert their parents that something had happened although not in detail. In my view this was a natural reaction by both the complainants to confide in someone they were close to particularly when they were confronted with an unexpected experience by their uncle. There was no need for the father of the complainants to be inquisitive and ask probing questions to his daughters when he was shocked to hear what the complainants had told him. In order to be within the confines of the law Laisenia did not want to confront the accused which is understandable. The mother of the complainants was angry after she heard what the accused had done to her daughters immediately reported the matter to the police.
111. The parents of the complainant were also truthful witnesses they were able to narrate to court what they were told by their daughters. The complainant's mother promptly acted upon her daughters complaint by

informing the provincial spokesperson and reported the matter to the police.

112. In my judgment both the complainants did tell their parents about what the accused had done to them although not all the finer details does not adversely affect the reliability of their evidence. Considering the age of the complainants they did disclose material and relevant information about the unlawful conduct of the accused which shows consistency in their evidence.
113. There is no legal requirement upon a complainant to tell all the details of the unlawful sexual conduct by the accused to the first person he or she sees (*see Anand Abhay Raj vs. State, CAV 0003 of 2014 (20 August, 2014)*). Here it was not expected for the daughters to tell their father every detail of what the accused had done to them.
114. In respect of the medical reports of both the complainants I disregard the history related by both the complainants to the doctor in respect of uncharged offences. After carefully considering the doctor's opinion and in view of all the evidence I am unable to accept the opinion of the doctor as conclusive. There are other possibilities why the hymen of both the complainants were not intact and the reddening in the vaginal area as the basis of my decision.
115. In respect of the caution interview, I have disregarded the admissions given by the accused in comparison with the evidence given by both the complainants hence no weight will be given to those answers. These answers did not conform to the evidence given by both the complainants hence it is unfair and prejudicial to give any weight to those admissions. I have also disregarded completely Q. & A. 45 in the caution interview which relates to uncharged acts.

In relation to count one:

“Q. 39. It is alleged by “M” that you poked her backside using your finger.

What can you say?

Ans. Yes, that is true.

116. I accept the evidence of the first complainant that the accused had inserted his penis on her backside.

In relation to count two:

“Q. 41. It is alleged by “M” that you inserted your penis inside her vagina which was very painful to her. What can you say?

Ans. Yes that is true.

117. I accept the evidence of the first complainant that the accused wanted to insert his penis into her vagina.

In relation to count four

“Q. 56. It is alleged by “R” that you inserted your penis from her backside.

What can you say?

Ans. Yes that is true.

118. The second complainant did not give any evidence in respect of the above hence I do not give any weight to the above answer.

119. In respect of the charge statement I have noticed that the charge officer had not put to the accused his right to consult a lawyer from the legal Aid Commission but to consult a lawyer of his own choice. The failure to put this right to the accused is unfair and in my judgment the officer knew or ought to have known that the accused was an ordinary villager who cannot be expected to have a lawyer of his own choice and the only

possible option would be to consult a legal aid lawyer. I give no weight to the statement made by the accused in the charge.

120. The defence has not able to create a reasonable doubt in the prosecution case in respect of the lesser offence of sexual assault in count one, lesser offence of attempt to commit rape in count two and in respect of the offence of rape in count three. However, there is a reasonable doubt in respect of the fourth count of lesser offence of sexual assault since the second complainant did not give any evidence in this respect.

CONCLUSION

121. This court is satisfied beyond reasonable doubt that the accused on 12th December, 2020 had unlawfully and indecently inserted his penis on the backside of the first complainant a 10 year old child which any right minded thinking person would have considered as sexual and indecent.
122. This court is also satisfied beyond reasonable doubt that the accused on 12th December, 2020 had attempted to insert his penis into the vagina of the first complainant a 10 year old child. What the accused did to this complainant was more than merely preparatory.
123. In respect of the second complainant this court is satisfied beyond reasonable doubt that the accused on 12th December, 2020 penetrated the vagina of this 7 year old complainant with his finger. There was no evidence given by the second complainant in respect of the lesser offence of sexual assault in the fourth count accordingly this court is not satisfied beyond reasonable doubt that the prosecution has proven this count.
124. In summary the accused is acquitted of the offence of rape in count one but found guilty and convicted of the lesser offence of sexual assault. For the second count the accused is acquitted of the offence of rape but found

guilty and convicted of the lesser offence of attempt to commit rape, for the third count the accused is found guilty and convicted of the offence of rape as charged and for the fourth count the accused is acquitted of the lesser offence of sexual assault.

125. This is the judgment of the court. Before I leave, I would like to mention that in the information for count 3 it is stated as subsection 2(a) of the Crimes Act which should be 2(b). I am satisfied that no prejudice has been caused to the accused by this omission.



Sunil Sharma

Judge

At Lautoka

5th July, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.