

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 193 of 2020

STATE

V

INOKE SATOKO

Counsel : Mr. Joeli Nasa for the State
Ms. Vinaina Diroiroi for the Accused

Dates of Trial : 16, 17, 19 & 24 August 2022

Closing Submissions : 30 August 2022

Judgment : 26 September 2022

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

JUDGMENT

[1] As per the Amended Information filed by the Director of Public Prosecutions (DPP), the accused above-named is charged with the following offences:

COUNT ONE

(Representative Count)

Statement of Offence

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

Particulars of Offence

INOKE SATOKO, between the 1st day of January 2019 and the 31st day of December 2019, at Rakiraki, in the Western Division, unlawfully and indecently assaulted **LB** by touching her breast and the surface of her vagina.

COUNT TWO

Statement of Offence

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

Particulars of Offence

INOKE SATOKO, on the 3rd day of March 2020, at Rakiraki, in the Western Division, had carnal knowledge of **LB** without her consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

INOKE SATOKO, on the 3rd day of March 2020, at Rakiraki, in the Western Division, penetrated the vagina of **LB** with his tongue, 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

INOKE SATOKO, on the 3rd day of March 2020, on an occasion other than that referred to in count two, at Rakiraki, in the Western Division, had carnal knowledge of **LB** without her consent.

- [2] The accused pleaded not guilty to the four charges and the ensuing trial was held over 4 days. Thereafter, the Learned Counsel for the Defence and 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 Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act; two counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act, and one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act.

- [6] The first count against the accused is a charge of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The offence of Sexual Assault is defined in Section 210 (1) of the Crimes Act as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person; or

(b)

[7] Therefore, in order to prove the first count of Sexual Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this instance between the 1 January 2019 and the 31 December 2019);
- (iii) At Rakiraki, in the Western Division;
- (iv) Unlawfully and indecently assaulted LB, the complainant, by touching her breast and the surface of her vagina.

[8] To further elaborate upon these elements in relation to the first count. 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.

[9] The second element relates to the specific time period during 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.

[10] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for Court to consider and decide whether the touching of the complainant’s breast and the surface of her vagina by the accused, is an indecent act and thereby amounts to Sexual Assault.

[11] Count One is also titled as a Representative Count. Section 70 (3) of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”) provides as follows:

When a person is charged with any offence of a sexual nature and the evidence points to more than one separate acts of sexual misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of a sexual nature occurred.

In such a case the charge must specify in the statement of offence that the count is a representative count.

[12] Therefore, as per legal terminology a representative count is based on an act or series of acts said to be done by the accused during the specified time period as stated in the said charge. In this instance, the prosecution is expected to prove just one incident of Sexual Assault, which falls within the period stipulated in the said charge. They need not prove a continuous or a series of incidents of Sexual Assault in support of a representative count.

[13] The second and fourth counts against the accused are charges of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act; while the third count is a charge of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act.

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

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

[15] 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.

[16] Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic 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.

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

[18] Section 207 (2) (b) makes reference to a person penetrating 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. In the instant case, the accused has been charged in count 3, for penetrating the vagina of the complainant with his tongue.

[19] Therefore, in order to prove the second count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance the 3 March 2020);
- (iii) At Rakiraki, in the Western Division;
- (iv) Penetrated the vagina of the complainant LB, 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.

[20] In order to prove the third count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance the 3 March 2020);
- (iii) At Rakiraki, in the Western Division;
- (iv) Penetrated the vagina of the complainant LB, with his tongue;
- (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.

[21] Similarly, in order to prove the fourth count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance the 3 March 2020), on an occasion other than that referred to in count two;
- (iii) At Rakiraki, in the Western Division;
- (iv) Penetrated the vagina of the complainant LB, 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.

- [22] To further elaborate upon these elements in respect of the three counts of Rape. The first element is concerned with the identity of the person who committed the offences. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offences.
- [23] The second element relates to the specific date on which the offences were committed. The third element relates to the place at which the offences were committed. The prosecution should prove these elements beyond reasonable doubt.
- [24] The fourth element involves the penetration of the complainant's vagina, with the accused's penis (in respect of counts 2 and 4) and the penetration of the complainant's vagina, with the accused's tongue (in respect of count 3). 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. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis and tongue, respectively, to any extent.
- [25] 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 (in respect of counts 2 and 4) and that the accused penetrated the complainant's vagina, with his tongue (in respect of count 3), without her consent.
- [26] 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.

[27] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis (in respect of counts 2 and 4) and that the complainant did not consent for the accused to penetrate her vagina, with his tongue (in respect of count 3); the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or 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.

[28] 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 14 years at the time of the alleged incidents of Rape, and therefore, she had the mental capacity to give consent. [Her date of birth being 30 July 2005].

[29] It must also be noted that in terms of Section 129 of the 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 and Sexual Assault are obviously considered as offences 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 Agreed Facts

[30] 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.

[31] Accordingly, the prosecution and the defence have consented to treat the following facts as “*Admitted Facts*”:

1. THAT accused is INOKE SATOKO, born on the 2nd of March 1972, and resides at Navutulevu, Rakiraki.
2. THAT the complainant is LB or LBT, born on the 31st of July 2005 and student of Nakauvadra High School [However, as per the complainant’s Birth Certificate-tendered as Prosecution Exhibit PE3-her date of birth is 30 July 2005].
3. THAT the complainant is the biological daughter of the accused.
4. THAT in 2019, the complainant was in Class 8.
5. THAT in the year 2020, the complainant was residing with her parents, the accused and mother Seraia Tunavatu, with two brothers and three sisters, at Vodovodo Settlement, Rakiraki.
6. THAT on the 25th of November 2020, the accused was formerly charged in the iTaukei language by WDC 3916 Litiana.
7. Copy of the birth certificate of LB is tendered by consent.

[32] 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

[33] The prosecution, in support of their case, called Detective Corporal 5045 Rajinesh Deo and the complainant (LB).

[34] The prosecution also tendered to Court a copy of the rough sketch plan of the alleged scene of incident as Prosecution Exhibit **PE1**, copies of the photographs taken of the

alleged scene of incident as Prosecution Exhibits PE2 (a) and PE2 (b) and the complainant's Birth Certificate as Prosecution Exhibit PE3.

[35] Evidence of Detective Corporal 5045 Rajinesh Deo

- (i) *The witness testified that he is 31 years of age. He has served in the Fiji Police Force for the past 8 years. For the past one month he has been serving at the Nalawa Police Station. Prior to Nalawa, he was based at the Rakiraki Police Station.*
- (ii) *The witness testified that on 12 April 2020, he was serving at the Rakiraki Police Station. On the said day, the Crimes Officer Inspector Clifford Waqabaca, had appointed him as the Investigating Officer for this case. He had been specifically instructed to visit the crime scene, photographed the crime scene and to look after the overall investigation of this case. The witness had complied with the said instructions.*
- (iii) *After the complainant LB was medically examined, she was taken to the alleged crime scene where the incident had happened. The alleged crime scene was beyond the Malake Landing, before Rarapatu Settlement, in the Rakiraki area. The complainant had been escorted by a female Police Officer WDC Litiana. The witness was also part of this escort to the crime scene.*
- (iv) *On arrival at the alleged crime scene, the complainant had taken the Police Officers to where the alleged incident happened. The witness had drawn the rough sketch plan of the alleged scene of incident. The said sketch plan was tendered to Court as Prosecution Exhibit PE1. The witness testified that the rough sketch plan was a fair representation of the alleged scene of crime.*
- (v) *This was a farming area-sugar cane plantation. The rough sketch plan depicts the sugar cane plantation and the exact location where the alleged incidents of Rape had taken place-which was on the grazing land at the edge of the sugar cane plantation.*
- (vi) *The witness testified that he had also taken photographs of the alleged crime scene. He had used his personal phone an LG mobile smartphone to take the said photographs. He had taken two such photographs. The said two photographs were tendered to Court as Prosecution Exhibits PE2 (a) and PE2 (b). PE2 (a) depicts the complainant pointing to the scene of the crime from the roadside; while PE2 (b) depicts the complainant pointing to the actual place where the alleged incidents of Rape took place.*
- (vii) *Detective Corporal Deo was cross-examined by the Learned Defence Counsel. He agreed that the rough sketch plan was drawn and the photographs of the alleged scene of incident were taken on 12 April 2020, which was over a month after the alleged incidents of Rape. The witness said this was done on the same day the complainant reported the matter to the Police.*

[36] Evidence of the complainant LB

- (i) The complainant's evidence was recorded over a period of 2 days. Her evidence was recorded in a 'closed court' and a screen was placed so that the complainant could not see the accused.*
- (ii) The complainant testified that she is currently 17 years old. She is currently residing at Wainibuku, Nakasi with her mother, step-father and siblings-3 sisters and 2 brothers. She is third in her family of 6 siblings. Her mother's name is Seraia Tunavatu. Her step-father's name is Sailosi Kadanavatu.*
- (iii) The witness testified that her date of birth is 30 July 2005. Her Birth Certificate was tendered to Court as Prosecution Exhibit PE3.*
- (iv) The witness said that in the year 2019, she was residing at Vodovodo Settlement in Rakiraki, with her mother, her father and her siblings. Her father's name is Inoke Satoko (the accused in this case).*
- (v) In 2019, the complainant was attending Naria Primary School and was in Class 8.*
- (vi) The witness testified to the events which took place on a night in the year 2019. "I can just remember when I fell asleep that night-one night around 12 midnight. I could feel someone touching my breast and inside my underwear. When I woke up, I saw my father besides me that night."*
- (vii) The complainant said that she was sleeping on the bed in the bedroom of their house in Vodovodo Settlement. She said that there was only one bedroom in the house. Her other siblings were sleeping down on the floor. The bed is situated just besides the door to the bedroom. At the time she was wearing a t-shirt and shorts. Inside her t-shirt she was wearing her bra while under her shorts she was wearing her panty.*
- (viii) The witness said that while she was sleeping, she could feel something was touching her breast. It was beneath her bra. She realized it was her father who was touching her breast with his hand. Her father had also touched her vagina on top of her panty. When she felt her father touching her, she had suddenly stood up.*
- (ix) The complainant said that she knew it was her father from the reflection of the moonlight. She said she felt scared and ashamed at the time. She had told her father to go away and sleep.*
- (x) When asked to further explain as to how her father had touched her breast from beneath her bra, the witness said that her father had put his hand from the bottom of her t-shirt and then up to her breast. Similarly when asked to explain how her father had touched her vaginal area on top of her panty, the witness said that he put his hand through her shorts and touched her vagina on top of her panty.*
- (xi) The complainant said that she did not agree for her father to touch her breast or to touch her vagina on top of her panty.*
- (xii) After standing up, she had come and laid besides her other siblings in the same bedroom-later she said it was her fourth sibling. Her father had then gone to*

- sleep besides her mother in the sitting room. The witness described the distance between the bedroom and the sitting room to be 8 metres.*
- (xiii) The complainant said that she did not raise an alarm or shout at the time because she was afraid. She explained: "Because if I tell my mother we will have some family problems". She said she did not tell her younger sibling because she was younger than her and she too would be afraid.*
- (xiv) When asked to explain why she was afraid, the witness said: "Because he told me, if I ever told someone about this, my mother will get into trouble."*
- (xv) Even the next morning, she had not informed anyone about what her father had done to her the previous night. When asked why she didn't do so, the witness said: "I did not tell anyone because I love my family....because my siblings were young at that time."*
- (xvi) The witness testified that although she recalled that this incident happened to her around midnight on a particular day in 2019, she was unable to recall the particular month or date. However, she said it was before her birthday (so before 30 July 2019). Thus, at the time the said incident happened, she was still 13 years of age.*
- (xvii) The witness testified that at the time (in 2019) it was just 1 year since she was living with her father (and mother) in Vodovodo Settlement. Since she was 8 months old, she had been cared for by her uncle Seremaia Nacike who is her mother's brother and staying at his residence in Vodovodo Settlement. Her uncle's house is about 30 metres from her parent's house. She had come back to stay with her parents when she was in Class 8 (when she was about 12 years old).*
- (xviii) When asked as to what made her come back home at that age, she said: "That's when I knew they were my mother and father".*
- (xix) The complainant next testified to the incidents which took place on 3 March 2020. At the time she was staying with her mother, father and siblings at Vodovodo Settlement. While they were at home, her father had asked her to go with him to Wananavu Resort-to her uncle Apakuki's place. This was around 10.00 in the morning.*
- (xx) The complainant said that at the time she was in Form 3 (Year 9).*
- (xxi) She had left with her father around 10.15 a.m. At that time she was wearing a t-shirt and a pants. Beneath her t-shirt she was wearing a bra and inside her pants she was wearing a panty and tights. Her father had been wearing a t-shirt and a $\frac{3}{4}$ pants.*
- (xxii) The complainant testified that she and her father had walked and reached the Wananavu signboard. It had taken about 1 hour to walk from Vodovodo Settlement to this point. From there they had looked for a car to go to her uncle's place. However, they could not find a car. So they proceeded to walk from the signboard to her uncle's place. It had taken them a further 45 minutes for this walk. They had reached her uncle's place at about 12.00 noon. Her uncle's house is situated close to the Wananavu Resort.*

(xxiii) *On reaching her uncle's place, they had tea and bread. Thereafter, her father and her uncle were talking inside the house. The witness had come down and was sitting at the seaside-on the beach. At around 1.00 p.m. her uncle had called again for them to have another cup of tea before they return back home. Thereafter, she and her father had left her uncle's place. The time was around 2.00 p.m.*

(xxiv) *She and her father had been walking back from her uncle's place when they came across a motor car. They had boarded the car which had dropped them off at the Wannavu signboard. After getting off at the signboard, they had been walking back home-on the right side of the main highway. On that side there were sugar cane plantations.*

(xxv) *The following questions were then asked from the witness and she answered as follows:*

Q. What happened (then)?

A. We were walking. We had not reached the bend at Malake Landing. When we were walking, he pulled my hand. When he pulled my hand, he took me to the sugar cane field.

Q. What did he use to pull your hand?

A. He used his hand-he pulled my left hand.

Q. Do you recall what hand he used?

A. The right hand.

Q. Where was his other hand?

A. He was looking for a route to take me to.

Q. What was your other hand doing?

A. He was holding on to my hands.

Q. Was he holding on to both of your hands when pulling you?

A. Yes.

Q. What did you do in response?

A. I tried to push him off. He was holding my hands tightly. He took me into the sugar cane.

Q. Did you manage to push him off and free yourself?

A. Yes.

Q. Then what happened?

A. I can't free myself, because he was holding me tightly.

Q. *What do you mean then when you said, you were able to free yourself?*
A. *I tried to go away from him, but I couldn't.*

Q. *What happened next?*
A. *After that he forcefully laid me down on the grass.*

Q. *What was the distance from the place he pulled your hands to the place he made you lie down?*
A. *10 metres from the highway.*

Q. *Could you see the highway?*
A. *No.*

Q. *What happened after he had made you lie down on the grass?*
A. *He laid me down. He held my hands tightly when I was lying down. Then he laid on top of my breast. Then he tried taking off my pants. I tried pulling up my pants but I couldn't. He was holding on to my hands tightly. I tried to shout but I couldn't. His hands were in my mouth. Then he forcefully took off my pants. Then I felt his penis went inside my vagina.*

Q. *What did he use to hold your hands tightly?*
A. *Both of his hands.*

Q. *Did he manage to take off your pants?*
A. *Yes.*

Q. *Apart from your pants, what else did he take off?*
A. *My pants, my underwear and my tights.*

Q. *What did he used to take off those clothes?*
A. *His right hand.*

Q. *Where was your father at this time?*
A. *He was on top of me.*

Q. *What was his left hand doing?*
A. *His chest was leaning down on me, his left hand was covering my mouth.*

Q. *What about both of your hands?*
A. *Both of my hands were crossed on my chest and his chest was leaning down on me.*

.....
Q. *What did he then do next?*

- A. *He tried to pull down my pants.*
- Q. *How did you react when you felt his penis go into your vagina?*
A. *It felt hard when it was inside.*
- Q. *Did you agree for this?*
A. *No.*
- Q. *Did your father know at that point in time that you did not agree?*
A. *Yes.*
- Q. *How did you know that he knew you were not agreeing?*
A. *I was kicking and trying to push him away.*
- Q. *Did you manage to do so?*
A. *No.*
- Q. *When he put his penis inside your vagina. For how long did he put it inside for?*
A. *About 3 minutes.*
- Q. *When he did this, did you like it?*
A. *No.*
- Q. *Before he put his penis into your vagina, who took off his pants?*
A. *He took off his own pants (3/4 pants).*
- Q. *When he took his own ¾ pants off and inserted his penis in your vagina, what were you doing?*
A. *I was lying down, his left hand was holding both of my crossed hand and his chest was leaning down on me.*
- Q. *Which hand did he use to remove his pants?*
A. *His right hand.*
- Q. *Did you shout when he was inserting his penis into your vagina?*
A. *I couldn't shout because my mouth was closed.*
- Q. *How was your mouth closed?*
A. *I was lying down, he was lying on top of me, my hands were crossed on my chest, he was leaning down on me and my hands were covering my mouth [the witness demonstrates as to how this took place].*
- Q. *You were lying facing the sky?*

A. Yes.

Q. *Your father was lying facing your face?*

A. *Yes. Face to face.*

Q. *After he inserted his penis into your vagina for 3 minutes, what did he do next?*

A. *After that he stood up from me-he tried to suck my vagina. Then I kicked him. His legs were leaning on my legs and both of his hands held my hands.*

Q. *How did you kick him?*

A. *With my legs.*

Q. *What did he then do?*

A. *He was trying to suck my vagina.*

Q. *How did he try and suck your vagina?*

A. *He tried to open my legs then he laid on top of me again.*

Q. *What did he use to do this? To try and suck your vagina?*

A. *His tongue.*

Q. *Did he suck your vagina?*

A. *Yes.*

Q. *Can you please describe how he sucked your vagina?*

A. *He opened my legs and sucked inside – inside my vagina,*

Q. *What did you do in response – how did you react?*

A. *I tried to kick him.*

Q. *What was the result of your attempt to kick him?*

A. *My knees were trying to kick him.*

Q. *Did you manage to kick him?*

A. *No.*

Q. *Why couldn't you kick him?*

A. *I did not know what to do on that day.*

Q. *Did you shout?*

A. *No.*

- Q. *Can you please explain why you couldn't shout?*
A. *His hands were strongly placed over my mouth.*
- Q. *Can you please tell us how you were positioned when he licked inside of your vagina?*
A. *When I was lying down, both of my thighs were open. When I was lying down, he was licking my vagina. I was trying to straighten my legs but he was leaning on (to) them.*
- Q. *What were your hands doing?*
A. *He was holding both of my hands.*
- Q. *How long did he suck the inside of your vagina?*
A. *About 2 minutes.*
- Q. *When he sucked your vagina, did you agree for him to do this?*
A. *No.*
- Q. *Did your father know at that time that you did not agree for him to suck your vagina for 2 minutes?*
A. *Yes.*
- Q. *How do you know that your father knew this?*
A. *Because I tried to find a way to get out of it but I couldn't.*
- Q. *Can you please explain why couldn't you find a way out of this?*
A. *Because I was held tightly and he was strongly leaning on me.*
- Q. *After that what did your father do next?*
A. *After that he tried to put his penis inside my vagina.*
- Q. *Can you please describe how he tried to do this?*
A. *He tried to put both of my legs down.*
- Q. *What did he use to do this?*
A. *Only his right hand was pulling both of my legs down.*
- Q. *What do you mean?*
A. *I was lying down, my legs were straighten, he was trying to open my legs.*
- Q. *How did he try and open your legs?*

A. *My hands were in my chest. He was leaning on my hands then his left hand tried to open my legs and his right hand was strongly covering my mouth.*

Q. *So he switched his hands?*

A. *Yes.*

Q. *Did you scream?*

A. *No, he was leaning on me.*

Q. *Did he manage to open your legs?*

A. *Yes.*

Q. *Then what did he do?*

A. *Then I got shocked that his penis was inserted inside my vagina.*

Q. *When he inserted his penis into your vagina, what was your reaction?*

A. *On that day I did not know what to do.*

Q. *Why did you say this?*

A. *The reason why I couldn't do anything, because he was strongly leaning on me.*

Q. *For how long did your father insert his penis into your vagina?*

A. *It was a bit long – about 3 minutes.*

Q. *Did you agree to this?*

A. *No.*

Q. *Did your father know at that time that you were not agreeing?*

A. *Yes.*

Q. *How did you know this at that time?*

A. *I was trying to control myself and trying to stand up. He was holding on me strongly.*

Q. *Did you like what your father did to you that day?*

A. *No.*

Q. *What happened next?*

A. *After that he stood up, he wore his pants, after that he had gone home first.*

Q. How did he go home?

A. He crossed through the sugar cane.

Q. Did your father tell you anything before he left?

A. He told me to put back my pants for us to go home.

Q. Did he tell you anything else?

A. He told whatever happened today, no one else should know about it.

Q. How did you feel?

A. When he told me that, I was afraid. I did not know what to do.

Q. Then what did you do?

A. After that, he left first. Then I got up and put on my pants. Then I followed the road back home.

(xxvi) The complainant said that she crossed the sugar cane field to go to the main road and then walked straight home. When she got home, her mother and other siblings were at home. Her father had also got home. When she reached home, it was after 4.00 in the afternoon.

(xxvii) The witness testified that she did not tell anyone at home about what had happened because her father had told her not to tell anyone. So she kept it to herself. She was also afraid to tell anyone.

(xxviii) The witness was asked as to what made her finally complain about what her father had done to her. She said: "Because he was doing a lot of bad things to me."

(xxix) The witness said that she had gone to the Police Station to complain about the matter on a Sunday. She doesn't remember the month. She had gone alone to the Police Station.

(xxx) When asked, what motivated her to complain to the Police, the witness said: "I was fed up of what was done to me every day."

(xxxi) She had reported the matter at the Rakiraki Police Station. Thereafter, she was taken to the Rakiraki Hospital to get her medical done. After the medical examination she had been taken by the Police to the alleged crime scene. Thereafter, she was taken to stay with her sister in Vatuse.

(xxxii) At the time she was taken by the Police for her medical examination, the Police had called for her mother to accompany them. The witness said, this was the first time her mother got to know about the incident. When asked as to why she did not inform her mother earlier, the complainant said: "I did not want to tell her because I love her and it could cause a family problem. It would interfere with my relationship with my mother because I was close to her."

(xxxiii) The complainant identified her father as the accused in the dock.

- (xxxiv) *The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant, totally denying the allegations of Sexual Assault and Rape.*
- (xxxv) *The witness agreed that she had been raised by her uncle Jerry and aunty Analaisa and that only when she was in Class 8 that she had moved back to her parent's house. So growing up, her aunty and uncle were like her parents and would discipline her.*
- (xxxvi) *The witness agreed that at times she was disobedient to her uncle and aunty. She agreed that even after moving back to her father's house, she was sometimes disobedient to her parents. She agreed that due to this, her parents, especially her father, would disciplined her.*
- (xxxvii) *With regard to the alleged incident which took place in 2019, it was suggested to the witness that the room she was sleeping in was dark and as such she could not identify her father that night of the allegation. However, the complainant denied this suggestion. She said: "I saw him and I knew it was my father who was standing beside me".*
- (xxxviii) *It was further suggested that she could not identify the person because the room was dark and the windows were closed. However, the complainant denied this suggestion. She said: "When he came I could recognize him because the curtains on the window was opened".*
- (xxxix) *It was put to the complainant that the 3 March 2020, was a Thursday and as such a school day (not a holiday as she had testified in her evidence in chief). She agreed when the calendar for the year 2020 was shown to her.*
- (xl) *The complainant agreed that she only went to the Police to report the matter against her father after there was an argument at home. She further agreed that the argument was on Friday 10 April 2020, and that she went to lodge her report on Sunday 12 April 2020.*
- (xli) *The witness was questioned about this statement she made to the Police, on 12 April 2020.*
- (xlii) *The Defence highlighted the following two contradictions in the evidence given by the witness vis a vis her statement made to the Police:*
- i. *In her testimony in Court she stated that she had not informed her mother about any of the allegations which took place in the years 2019 or 2020, prior to informing the Police.*
- However, in her statement it is recorded as follows: "I have told my mother about everything who didn't do anything at all".*
- ii. *That In her testimony in Court she stated that at the sugar cane field her father had removed her panty, her tights and her shorts.*

However, she had been wearing her t-shirt. So only her bottom half was without clothes.

However, in her statement it is recorded as follows: "While on top of me, I was without clothes...."

(xliii) The complainant was questioned about a friend of hers, who is also a cousin, named Vasemaca Dugudrau. Vasemaca's father and her father are cousins. The witness agreed that Vasemaca was a good friend of hers and with whom she shares secrets.

(xliv) The following further questions were asked from the witness in cross-examination and she answered as follows:

Q. You told Vasemaca about the boyfriend and girlfriend relationship you shared with Yabaki?

A. No.

Q. Your father had been taken to prison (to remand) some time on the 27 November 2020?

A. Yes.

Q. In January of 2021, you, your mum and your siblings had gone to Nadi to be with your mum's new partner?

A. Yes.

Q. In February of 2021, you and another sister had gone to Vasemaca's house at FSC Compound, Rakiraki?

A. Yes.

Q. There you informed Vasemaca that the allegations you made against your father was false?

A. No.

Q. I suggest to you that you had told Vasemaca that the allegations that you made against your father were false?

A. No.

Q. I also suggest to you that you had informed Vasemaca that you and your mum both knew that the allegations were false?

A. No.

Q. I also suggest to you that you made these false allegations because you were aware that your mother was in a relationship with another man?

A. No.

Q. And when you were at Vasemaca's house in February 2021, your mother came from Nadi to take you and your sister back to Nadi?

A. Yes.

Q. And also Vasemaca went back with your mum, you and your sister?

A. Yes.

Q. I suggest to you that the allegations that you have made against your father has never happened?

A. No.

Q. What do you mean by no?

A. The allegations happened.

(xiv) In re-examination, the State Counsel attempted to clarify from the witness the answers given by her in cross examination.

[37] At the end of the prosecution case Court decided to call for the defence of the accused. 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.

[38] The accused exercised his right to remain silent. However, he called witness Vasemaca Dugudrau, in support of his case.

Case for the Defence

[39] Evidence of Vasemaca Dugudrau

- (i) The witness testified that she is 18 years old and was residing at FSC Compound in Rakiraki. Her date of birth is 4 May 2004.
- (ii) Currently she is living in Nadugu which is in Rakiraki Town. She has been living there for the past 2 months with her mother and her father.
- (iii) The witness testified that in the year 2020 she was residing at FSC Compound in Rakiraki.
- (iv) The witness said that she knows Inoke Satoko who is the accused in this case. He is her uncle from her father's side. He is a brother of her father (not

biological brothers but cousin brothers). She also knows Inoke's daughter (LB) who is her cousin and her best friend and a person she shares secrets with. They both were going to the same school.

- (v) The witness said that she remembers the time the accused was taken to remand, in November 2020. At the time, she was still residing at FSC Compound in Rakiraki.*
- (vi) She testified that after he was taken into remand, the accused's wife and the children had moved to Nadi, as accused's wife was said to be seeing another man. This was in January 2021.*
- (vii) The witness said that in February 2021, the complainant and her sister had come to stay at her place at the FSC Compound in Rakiraki. They had stayed at her place for nearly 4 months. The complainant and her sister had gone to school from the witness's house.*
- (viii) The witness said that (during this stay) the complainant had informed her thus: "I was doing LB's hair and she informed me that the report lodged at Rakiraki, it is a lie. She informed that her mother planned this, reason being she was seeing another man."*
- (ix) The witness testified that she knows a boy by the name of Yabaki. She knows Yabaki because he was the complainant's boyfriend.*
- (x) In May 2021, the witness had gone with the complainant and her sister to Nadi to stay with the complainant's mother and her stepfather Sailosi Kadanavatu. She had stayed with them in Nadi for nearly 6 months.*
- (xi) The witness was cross-examined at length by the State Counsel. She confirmed that she never went to the Police Station or told any Police Officer about the information she heard from the complainant.*
- (xii) She said that the first time she actually shared this news or information with anyone was after 6 months, when she came back from Nadi. She said she had informed her mother. However, she confirmed that neither she nor her mother went to the Police Station to inform the Police about this information.*
- (xiii) When asked how then, she informed the accused's counsel of this information. The witness said: "Inoke's lawyer called my mother. They came, we talked. And I informed them of this information."*
- (xiv) When asked how they knew that she knew of this information, the witness said that when her brother went to the Remand Centre he had informed the accused about it.*
- (xv) It was suggested to the witness that it was the accused who had told or advised her to say what she has told Court today. The witness denied this suggestion.*
- (xvi) The witness said that she had returned in December 2021, after spending 6 months in Nadi with the complainant. She had informed her mother about what the complainant had told her about 3 to 4 months after her return back home.*

(xvii) When asked why she waited so long to inform her mother, the witness said: "I didn't really think that it was important what she told me. That's why I didn't inform my mother (immediately)."

(xviii) When asked what then made her to inform her mother 3 to 4 months later, the witness said: "Just came into my mind to say it to my mother."

Analysis

- [40] As stated before, the prosecution, in support of their case, called Detective Corporal 5045 Rajinesh Deo and the complainant (LB). The accused exercised his right to remain silent. However, he called witness Vasemaca Dugudrau, in support of his case.
- [41] The burden of proving each ingredient of the charges 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 all the elements of the charges beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove in paragraphs 7, 19, 20 and 21 of this judgment.
- [42] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.
- [43] Based on the said admitted facts it is admitted that the complainant is the biological daughter of the accused. As per her birth certificate which was tendered by consent, the complainant's date of birth is 30 July 2005. In the year 2019, the complainant was in Class 8 and in the year 2020, the complainant was residing with her parents, the accused and mother, with two brothers and three sisters, at Vodovodo Settlement, Rakiraki.
- [44] I have summarized the evidence of all witnesses led during the trial.
- [45] The accused totally denies all the allegations made against him by the complainant. The defence position is that the allegations made against him by the complainant are all false and that the reason she made these false allegations against the accused was because she was aware that her mother was in a relationship with another man. In support of this claim the defence called witness Vasemaca Dugudrau to testify on behalf of the accused.

- [46] Witness Vasemaca testified that sometime between February and May 2021, while the complainant and her sister were staying at her house at the FSC Compound in Rakiraki, the complainant had informed that the report lodged by her at Rakiraki was a lie. The complainant is said to have informed that her mother planned this due to the reason that she was seeing another man. However, Vasemaca had failed to inform the Police or anybody about this important piece of information.
- [47] It is Vasemaca's testimony that in May 2021, she had accompanied the complainant and her sister to Nadi, to stay with the complainant's mother and her stepfather. She had stayed in Nadi for 6 months. Only about 3 to 4 months after returning home to Rakiraki had she shared this news or information with anyone. She said she had informed her mother about what the complainant had told her. However, even her mother had failed to inform the Police or anybody about this important piece of information. The witness testified that when her brother went to the Remand Centre he had informed the accused about this information.
- [48] It is the contention of the Prosecution that it was the accused who had told or advised Vasemaca to say what she testified to in Court. Although, the witness denied this suggestion, Court is in agreement with the Prosecution. If this sought of information had in fact been told to the witness by the complainant, it was imperative for her to promptly inform the authorities about it. However, she had failed to do so for over 10 months.
- [49] For the aforesaid reason, it is my opinion, that the defence version cannot be accepted as truthful and reliable and I reject the defence version.
- [50] The complainant testified at length as to how the accused had committed the alleged offences on her. At the time she testified in Court the complainant was 17 years of age. Her date of birth being 30 July 2005. Therefore, at the time of the alleged offending, she would have been only 13 years old (at the time of the Sexual Assault charge), and 14 years old (at the time of the charges of Rape), and as such still a child under 18 years of age.
- [51] The Defence attempted to impeach the complainant's credibility during her cross examination by stating that the complainant did not complain of the incidents immediately as it happened.

[52] I agree that the complainant only reported the matter to the police on 12 April 2020. This was nearly one year after the alleged incidents of Sexual Assault and a little over a month after the alleged incidents of Rape.

[53] However, this Court is conscious of the fact that children do not always react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned.

[54] The complainant has clearly testified the reasons for the delay in reporting the matter to any family member or to the Police. The witness testified that she did not tell anyone at home about what had happened because her father had told her not to tell anyone. So she kept it to herself. She said she was also afraid to tell anyone. She also did not want to cause problems within the family. I am satisfied with the complainant's explanation for the delay in reporting the matter.

[55] The defence also attempted to impeach the complainant's credibility by highlighting two contradictions in her statements made to the Police on 12 April 2020, in comparison to the testimony given by her in Court. I have identified and made reference to the said inconsistencies when summarizing the complainant's evidence.

[56] The two contradictions highlighted by the defence were:

(i) *In her testimony in Court the complainant stated that she had not informed her mother about any of the allegations which took place in the years 2019 or 2020, prior to informing the Police.*

However, in her statement it is recorded as follows: "I have told my mother about everything who didn't do anything at all".

(ii) *That In her testimony in Court she stated that at the sugar cane field her father had removed her panty, her tights and her shorts. However, she had been wearing her t-shirt. So only her bottom half was without clothes.*

However, in her statement it is recorded as follows: "While on top of me, I was without clothes...."

- [57] In *Sivoinatoto v. State* [2018] FJCA 68; AAU0049.2014 (1 June 2018); the Fiji Court of Appeal discussed as to how a Court should deal with issues arising out of contradictions and omissions.
- [58] As to the first contradiction the complainant insisted during her testimony in Court that she had not informed her mother about the allegations prior to reporting the matter to the police.
- [59] As to the second contradiction it is manifest that what the complainant had meant when she told the police that she was without clothes was that she was only partly naked and not totally naked. This is what she has testified to in Court when she said that at the sugar cane field her father had removed her panty, her tights and her shorts. However, she had been wearing her t-shirt.
- [60] Therefore, having duly considered the explanations offered by the complainant, it is the opinion of this Court that the said explanations are reasonable and acceptable. As such, I am of the opinion that the reliability and credibility of the said evidence is unaffected.
- [61] In this case the defence is alleging that the complainant and her mother have colluded and made up this whole story against the accused, who is her own father. However, it must be borne in mind that the complainant in this case is not merely complaining of an isolated incident or a single act. Here the complainant has testified to a sequence of events or a series of acts which the accused perpetrated on her, on two separate occasions, nearly one year apart. Therefore, it is the opinion of this Court that it is highly unlikely for the complainant, who was merely 13-14 years old at the time, to make up or manufacture such a sequence of events against her own father, unless it really took place.
- [62] Having analysed all the evidence in its totality, it is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable. The complainant withstood the rigorous cross examination by the Defence and remained consistent throughout her evidence, in relation to the material particulars of this case.
- [63] It must also be mentioned once again that in terms of the provisions of Section 129 of the Criminal Procedure Act, where any person is tried for an offence of a sexual nature,

no corroboration of the complainant's evidence shall be necessary for that person to be convicted.

[64] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charges of Sexual Assault and Rape with which the accused has been charged.

[65] In the circumstances, I find the accused guilty of the first count of Sexual Assault and second to fourth counts of Rape with which he is charged.

[66] Accordingly, I convict the accused of the first count of Sexual Assault and second to fourth counts of Rape.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 26th Day of September 2022

Solicitors for the State: Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused: Office of the Legal Aid Commission, Lautoka.