

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

**Crim. Case No: HAC 57 of 2020**

**STATE**

vs.

**RAM KRISHNA**

**Counsel:** Ms. Lomaloma for the State  
Mr. J. Reddy & Mr. K. Kumar for the Accused

**Date of Hearing:** 24<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> October 2022

**Date of Closing Submission:** 28<sup>th</sup> October 2022

**Date of Judgment:** 02<sup>nd</sup> November 2022

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**JUDGMENT**

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*(The name of the victim is suppressed she will be referred to as "S.C.B")*

Introduction

1. The Director of Public Prosecutions has charged the Accused for the following offences as per the Amended Information.

**[COUNT 1]**

*Representative Count*

*Statement of Offence*

**SEXUAL ASSAULT: Contrary to section 210 (1) (a) and (2) of the Crimes Act 2009.**

*Particulars of Offence*

**RAM KRISHNA**, between the 1<sup>st</sup> of March 2020 and the 20<sup>th</sup> of March 2020, at Labasa in the Northern Division, unlawfully and indecently assaulted **S.C.B** by bringing into contact his tongue and her vulva.

[COUNT 2]

*Representative Count*

*Statement of Offence*

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

*Particulars of Offence*

**RAM KRISHNA**, between the 1<sup>st</sup> of March 2020 and the 20<sup>th</sup> of March 2020, at Labasa in the Northern Division, had carnal knowledge of **S.C.B**, a child below the age of 13 years.

2. The trial commenced on 24<sup>th</sup> of October 2022 upon reading and explaining the charges the accused pleaded not guilty to the counts of sexual Assault as well as Rape.
3. This is an allegation of sexual assault and rape of a 10-year-old girl by her elderly neighbour. The prosecution led the evidence of S.C.B and her mother Sanju Lata and Dr. Florecills and closed its case. As there was prima facie evidence, the defence was called for and the rights were explained. The accused opted to give evidence. This court heard the closing submissions as well as received written submissions. I will now endeavor to pronounce the judgment.
4. For the Accused to be found guilty of the representative count No. 1 that of “sexual assault” under section 210 (1)(a) and (2) of the Crimes Act, the prosecution must prove beyond reasonable doubt, that the Accused himself did on the date and place specified in the charge, unlawfully and indecently assault S.C.B as described in the charge.

5. Sexual assault is an aggravated form of indecent assault. The prosecution must prove the above elements against the Accused beyond reasonable doubt. “Assault” is to apply unlawful force to the person of another without his or her consent. The “assault” must be considered “indecent” by right thinking members of society. The test is basically objective.
6. The ingredients of Sexual assault under the 1<sup>st</sup> limb of section 210 and indecent assault as defined under section 212 of the crimes Act are the same except for the distinction in the titles of the respective sections. It appears that sexual assault is an aggravated form of indecent assault as it carries a higher sentence. Thus, considering the use of the word ‘*sexual*’ in the title of section 210, I am of the view that, sexual assault should necessarily be involuntary contact of a ‘sexual’ nature that occurs through the Accused's use of force, coercion or the victim's incapacitation.
7. For the Accused to be found guilty of the representative rape count 2 in the present case based on sub sections 2(a) and (3) of Section 207 that in addition to the date and the place stated in the in the particulars of the offence the prosecution must prove beyond reasonable doubt, the following elements:
  - (i) the Accused,
  - (ii) had carnal knowledge with or of S.C.B,
  - (iii) That S.C.B is less than 13 years of age.
8. If S.C.B is proved to have been under 13 years of age consent is not an issue. In the context of this case, ‘carnal knowledge’ is an act of penetration of the vulva or vagina of the complainant with the penis of the Accused. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act.

#### Burden of Proof

9. The Accused is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shift to the Accused. There is no obligation or burden on the Accused to prove his innocence. The prosecution must prove the Accused’s guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the Accused’s guilt, or if there be any hesitation in

my mind on any of the ingredient or on the of evidence led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has a right to remain silent and no adverse inference can be drawn if the Accused opts to remain silent.

#### Admitted Facts

10. The following facts are admitted in this case.

1. *Ram Krishna was born on the 16<sup>th</sup> of October 1956.*
2. *He is also known by the name "Kissun".*
3. *He has resided at Vunika, Labasa for the past 40 years.*
4. *He is married to Ima Wati and together they have two children.*
5. *His immediate neighbour is Subash Chand who is married to Sanju Lata.*
6. *Subash Chand and Sanju Lata have three children together, two boys and a girl.*
7. *The girl is named S.C.B (hereinafter referred to as the 'complainant').*
8. *The complainant was medically examined at the Labasa Hospital on the 14<sup>th</sup> August 2020 by Dr. Florecilla N. Ecube.*
9. *As a result of the examination, Dr Ecube prepared a medical report based her findings dated the 14<sup>th</sup> August 2020.*

#### Prosecution case

11. The prosecution commenced with the victim S.C.B whose birth certificate was marked and produced as PE1. Her date of birth is 16 November 2009. Accordingly, she was 12 years and 11 months when she gave evidence before this court. She gave sworn evidence. As she was a minor, I observed her responses and manner of giving evidence. To my mind she clearly understood the nature and the import of the oath and she was of sufficient maturity to understand the difference between the truth and untruth and the nature of the evidence she is required to give in this court.

12. S.C.B is the victim and according to her in March 2020 she was living with her parents, younger brother and the grandmother in Vunika, Labasa. She identified the Accused to be her immediate neighbour namely Ram Krishna. She gave evidence protected by a screen however for the purpose of identifying Accused, the screen was moved temporarily. During the month of March between 1<sup>st</sup> and the 20<sup>th</sup> she claims to have been sexually abused by the Accused on five different occasions. All these occasions she had been at home with her

grandmother and younger brother and her parents were out at work and the elder brother was living elsewhere with an aunt.

13. On the first occasion one afternoon when she was cleaning their garden, she had heard a *shh-shhh-shhh* noise and she had seen the Accused standing near a mango tree just beyond their back garden. She had gone to him as she thought he was trying to give something. However, when she reached him, he had pushed her from her chest and she had fallen backwards face upwards. The Accused had then removed her tights and inserted his penis into her private part which she later on said was the place from which she urinates. The Accused is alleged to have licked the top of her *mimi* which she also referred to as the place she urinates or the female organ. She explained that the Accused was kneeling down in front of her when he inserted his penis and then shifted down when he licked her female organ. After doing so, the Accused had threatened that he will kill her if she told this to anybody. She had not told anyone as she was afraid of the Accused.
14. Two days thereafter she had been plucking mangoes with a stick and the Accused had come and approached her. She had told him not to come and threatened him with the stick. The Accused then taken the stick, thrown it away and has done the same thing he did on the previous day. He has inserted his penis into her vagina and licked her female organ and also kissed her breast.
15. The following afternoon she had been playing in the garden by herself when the Accused had called her by shoing to come near the mango tree. The Accused has threatened that he will kill her if she doesn't come. So she had gone. On that day too he had done the same thing as done before (she explained the same act).
16. On the next day when she was hanging the clothes out she heard the *shh..shhh..shh* noise again from the mango tree. On this day too she had gone up to the mango tree. The Accused had done the same thing as done on the previous day.

17. A day thereafter, she had gone to throw the rubbish when the Accused had made the *shh.. shhh...shh*, noise and called her to the same mango tree. The victim has gone there and had been abused as done before.
18. She says that she was threatened that she would be killed if she would disclose this to anyone and she was scared. Whenever the Accused called, she had obeyed and gone up to him because of fear she says. However, after the fifth occasions she had remained in the house without going out for several days. On one occasion when she was travelling in the bus, the wife of the Accused Ima had got in to the same bus and sat beside her and asked about the incidents. As Ima was forcing her and persisting she had told what the Accused had been doing to her. Ima had apparently told this to S.C.B's aunt who had informed her brother and then the brother in-turn had informed her mother. Her mother had subsequently asked her and she had told what the Accused had done to her. However, they have not complained to the police immediately because there was another case pending between her mother and Ima. So they have remained silent.
19. However, Ima appears to have told this to various people in the village and also then Ima had come up to their house and had been swearing at her calling her a "bitch" and "mother fucker" in Hindi. Her grandmother and her younger brother were at home when she was so swearing. When her mother came in and she had told her about the swearing. Then the neighbours too have got to know and they have inquired as to why no complaint was made. As such the victim and her mother have complained to the police.
20. According to her these incidents happened in the afternoon when her mother and father were out at work and only her grandmother and the younger brother were at home. On such occasions the grandmother was either asleep or doing something in the kitchen. She was about 80 years of age.

21. Her elder brother was living with an aunt at Valelevu attending school from there. The Accused had been in the neighbourhood since she was small and he used to occasionally come to their house to drink grog with her father.
22. She was extensively cross examined almost for one full day. During the cross examination the defence produced six photographs and tendered the same as exhibits DEMFI 1 to 6 all of which were shown to the witness and she identified them as being photos of the two houses and depicting the mango tree under which the incident took place. (These photos have been taken in 2022).
23. The two houses of the Accused and the victim are separated by a hedge and there is an opening or a gap which enables a person to walk through. The mango tree under which the incidents are alleged to have taken place is towards the rear end of the compound of the victim's garden. However, the same mango tree is outside the compound and she admitted that there is an incline from her house to the mango tree. She also admitted that the yellow colour house made of corrugated sheets is her house on the photos.
24. She was cross examined in great detail on the case pending between her mother and Ima the wife of the Accused. She admitted that an incident took place in 2017 and a complaint was made by the Accused's wife Ima against her mother and there was a Magistrates Court case pending. She also admitted that since then the two families were not in talking terms and her mother has advised her not to go to the Accused's house.
25. She was cross examined in respect of the alleged five incidents of rape and it was suggested that if they were enemies she would not go when the Accused called. The victim said that on the second occasions she was plucking mangoes when the Accused came there and the other occasions he made a noise and called her and due to fear she went there. She admitted that she was also given money on the last occasion by the Accused.

26. It was suggested that if she was pushed back she ought to have sustained injuries to her back. The witness explained that as she fell backwards she kept her hands on the ground and prevent falling down and that this place was soft and muddy.
27. Then she was questioned extensively on the position of the Accused when the acts were committed. She said that the Accused was on the kneeling position with her legs parted and the Accused had with his toes held her feet down. According to her evidence, the Accused had inserted his penis and then taken it down and licked her vagina thereafter. She was asked how she knew that the penis was inserted. She said that she felt the penis going in to her vagina. She admitted that he also rubbed his penis on her private part and said that he also sucked her breasts. She had not felt any pain when the Accused moved up and down and says that the Accused put his tongue also on her “vulva”. She admitted that the first occasion the Accused did this in March and he has not done so before.
28. She admitted that after these incidents she returned home but did not tell her grandmother or anybody. She also admitted in cross examination that she usually attends to the household chores in the mornings. The defence suggested that she could not have been hanging clothes or cleaning the garden in the afternoon, she denied the same.
29. The following contradictions were elicited during cross examination. She denied wearing a panty in evidence but in her statement she had mentioned that she was wearing a pink panty. Then in evidence she said that the penetration of the penis was committed first and then he licked her vulva but in the statement the first act referred to is licking of the vulva following penetration. In evidence she stated that when Ima was swearing her grandmother was at home whereas in her statement it is mentioned that her mother was at home. Then it was also elicited that the alleged words used in swearing in her evidence was bitch in Hindi whereas in her statement it is female dog in Hindi. (Minor difference in the word used).



30. The defence suggested that the Accused never committed any of the acts as alleged and this is a false and a fabricated complaint made against the Accused because of the toxic relationship between the two families. The witness denied and said that when the mother got to know about the incidents, her father did not want to report this because her mother was having another case and she also will have to go to court for this matter. She admitted that in 2017 the said case was withdrawn in May 2020 by Ima.
31. In re-examination she said that during the said week she stayed at home because of her periods which she referred to as the “girl’s problem”.
32. Next the prosecution called the victim’s mother, **Sanju Lata**. She’s the mother of the victim married to Subash Chand and she lived in the house at Vunika with her mother-in-law who was 79 years old and her three children aged, 15, 13, 10 now. She had been a market vendor and her husband too has been working. On a day in March 2020 while she was preparing some sweets for a prayer session she was told of a rape incident involving her daughter S.C.B Chand. When she was told of this she had got into her rage and beaten up her daughter. She had wanted to inform the police but she was ashamed and she had another case with the Accused’s wife. She had not proceeded to complain. In cross examination she stated that she wanted to kill her daughter and also to kill Ram Krishna but her husband had told her to calm down.
33. In view of an incident in 2017, the relationship between the two families was strained. The said case had been pending and the complainant was Ima the wife of the Accused. However, Sanju Latha had been forgiven by Ima and the case had been withdrawn in May 2020. Apart from this incident there had not been any other disputes between the parties. However, around August 2020, rumour was spreading that her daughter was raped by the Accused. As she was ashamed by this as she had only one daughter, she had then decided to report it to the police in August 2020.

34. It was suggested that her husband Subash approached Ima to seek forgiveness for the previous case which she denied and said that they spoke to her husband. However, admitted that she was forgiven and that case was withdrawn. It was suggested that after the said complaint she became bitter and there was a lingering animosity with Ima and family and that they did not talk to each other even after the said case was so settled, which she admitted.
35. In evidence she said that she did not hear the swearing by Ima but in her statement she had said she heard the swearing. She admitted that though she got to know of the incident in March she waited till August to complain and that she did not ask Ram Krishna about this. She admitted further that it was three months after the withdrawal of the other case and forgiving that she complained of the rape. She also admitted that her daughter told her that the Accused had given her money after the said acts. It was suggested that the complaint is false and fabricated to take revenge, which she denied and said that she would not bring her daughter to court and it is not false and that she would not swear upon the holy book if it was false. She also said that she feels very bad for her daughter having to come to court and having to go through this and it is not revenge. She admitted that she discussed this with her husband in April 2020 and he told her that if they complain the daughter will also be questioned and she will also have to go to court.

#### Medical Evidence

36. Dr. Florecilla Ecuba was called by the prosecution and according to her she had examined the victim and observed that her external genitalia opening was wide. She was able to open the vaginal orifice with her two fingers and she was able to see the inside and the vaginal floor. She had observed a cleft and slit at 3 o'clock position which tear had gone to the edge of the mucosa. In lay terms she had observed healed tear on the hymen going right across to the edge of the ring of the vaginal wall. However, according to the case history as this is an old incident she was unable to give any time frame as to the age of the tear. She said this is an abnormality meaning that this is a tear due to some insertion of some object. In cross examination she said a tear in the hymen may be due to the penetration of the penis and it is also possible due to various other reasons such as exercise, riding a horse or bicycle.

However, as far as her observations are concerned there had been a tear in the hymen which was older than a month at least.

37. Both in examination in chief as well as cross examination the history given by the victim was elicited as far as the history is concerned it will be considered only to ascertain the consistency of the victim's evidence. It will not in any way be considered as substantive evidence against the Accused.
38. In cross examination the doctor said the victim did not mention anything about having her menstrual flow or period during that time. The doctor also in response to cross examination said that when a person is having periods, there won't be any unusual odour (smell). The medical report was produced as exhibit PE2.

#### Evaluation of Prosecution Evidence

39. S.C.B was around 12 years when she gave evidence. She was cross examined for almost one full day. I observed that during her cross examination she was very prompt and precise in responding to the questions. She generally gave direct answers to the questions and when being cross examined as to the details of the five incidents. She clearly appear to be recalling and recapturing her past experience and responding to the questions. The demeanour and deportment was thus extremely consistent with that of a truthful witness.

#### Consistency

40. She had made the first statement on the 14/8/2020. She had also given a case history to the doctor on the same date and she gave evidence two years thereafter in this court. The contradictions that arose are as follows. The fact that she was wearing panty was stated in the statement but was denied in her evidence. Lets consider this. She was 10 years when the complaint was made and is now giving evidence after 2 years. She had been wearing black tights. The contradiction was in respect of the panty worn beneath. She had faced multiple acts of rape during the space of a week. In this backdrop she had stated in the statement what she was wearing during the first incident. True there is a contradiction. But considering her

age and the lapse of time and the multiple incidents this contradiction has arisen not due to the utterance of a falsehood but if at all due to faulty memory.

41. As to the sequence of events whether the penetration preceded the licking is the next contradictions. According to the statement licking is the first act and then penetration but in evidence the sequence is reversed. When a victim of young age is subjected to multiple sexual incidents and the very nature of sexual activities is such it is not possible that a set uniform sequence will be followed by a person engaged in sexs. Licking and penetrating may precede one or the other in the heart of passion. The Accused had also sucked and licked the breasts too. A plethora of act, have been committed. In this back drop it is not possible to remember the exact sequence especially when there were multiple incidents. This too I will attribute more to faulty memory and multiple events and lapse of memory as stated above.
  
42. Finally as to whether her mother was at home on the 20<sup>th</sup> of March when Ima was uttering the swear words. According to the evidence she had told her grandmother who was there. According to the statement her mother heard it herself. The issue is whether it was the mother or grandmother who was there and heard it. There is a contradiction between the mother and the grandmother. On the consideration of the totality of the evidence the mother had been at home but was preparing some sweets. The mother has heard something but could not comprehend what it was. Hence, her elder son appears to have been at home and told her and then the mother had inquired from the victim. It is apparent that it is upon so inquiring that the victim had narrated the incidents to the mother. Thus her grandmother was present with the victim when the swearing was taking place and the mother was elsewhere in the house. It is this sequence of events narrated that has caused the confusion. Thus, it is more of a confusion than a contradiction. Thus this is due to a miscommunication in making the statement by a small girl that has resulted in this contradiction. Therefore I would not consider it as serious. Apart from these contradictions there were no contradictions or omissions as far as the main acts or incidents of rape were concerned. Therefore the evidence of the victim is consistent I hold.

43. It was submitted by the defence that if the tights were lowered half way to the thigh level the victim could not have separated and parted her legs as stated by her. Let me consider this now. What did the victim say? The relevant evidence emanated in cross examination as follows:

*Mr Kumar: Now, when my client had removed your panty you were completely naked, my apologies, tights sic. (tights) you were completely naked?*

*Ms Bahadur: It, was only half my tights, My Lordship.*

*Mr Kumar: Now, when you say half can you tell me up until where?*

*Ms Bahadur: Bottom of my knee, My Lordship.*

44. Thus according to the victim her tights were lowered up to the *bottom of the knee*. Bottom of the knee will be and mean the lower end of the knee and that is necessarily passing the knee and towards the upper end of the leg after the knee joint. Then the Accused had had come between her legs and got to a kneeling position and she explains how the Accused positioned himself and with his toes held her feet to the ground. After removing the tights and lowering it to the end of her knees when the Accused has positioning himself in this manner it is extremely possible and probable that her tights gets pushed downwards due to the Accused positioning himself between her thighs. Thus it is possible to part her legs as testified. Thus there is no improbability as submitted by the defence and the victim's evidence on this is probable.
45. The learned defence counsel submitted that if the victim was having her menstrual period that it is very unlikely a person would lick her vulva, and as such it is improbable. Let's consider this submission. The victim did admit that she was having "the girl's problem" or periods during that particular week. If that be so will the Accused lick her vulva? The defence in cross-examination elicited from the doctor that there would not be an unusual smell or odour when a person is having a menstrual flow. In any event the victim's evidence is that the Accused licked the top of her female organ and the place she urinates which appears to be licking of the outer parameters of the top end of her vulva. It is certainly not a licking of her vagina or the vaginal orifice. Thus, even if she was having some form of menstrual flow the licking as described by her is certainly not improbable.

### Delay in complaining by the victim

46. The victim has not complained promptly or revealed this to any one of her family. According to her in March she was raped five times within one week. She had told this to the wife of the Accused when she asked her about it in the bus shortly after the incidents. However she has not revealed this to her parents or family promptly. It is settled law that **recent complaint** is relevant to the question of consistency, or inconsistency, of the complainant's conduct, and as such is a matter that goes only to her credibility and reliability as a witness. (vide Raj V The State 92014) FJSC 12: CAV 3 of 2014, 20 August 2014). Justice Fernando (President of the Court of Appeal of Seychelles) in Jean-Luc Louise v state [2021] SCCA 72 considering the delay similar circumstances opined that,

*“The matter of recent complaint only goes to the issue of credibility and consistency of the complaint....” and that, “...Delay is a typical response of sexually abused children, as a result of confusion, denial, self-blame, embarrassment, powerlessness and overt and covert threats by offenders”.*

47. Her explanation is that the Accused had threatened her that this should not be told to anybody and that she was afraid to tell the mother or the grandmother as they would hit/assault her. Apart from this, she had also been given money by the Accused on the last occasion. Further it appears that she may have begun to enjoy the new sexual experience at some point. Hence concealing and remaining silent by the victim is highly probable.

48. It is common ground that the two families were having an estrangement during this period and they were not in talking terms. That being so it is also possible for the victim to remain silent. The victim was 10 years old, the Accused was over 60 years old. He had been a neighbour since her birth. In that scenario though the families may have been estranged a girl of 10 years may be easily intimidated or lured by an elderly known neighbour. Further this girl had been in the house with her grandmother and her younger brother most of the time. Her mother and father have been generally out at work. To that extent she's extremely vulnerable and will easily succumb to even a mild threat followed by some inducement by such a neighbour. The two houses are close to each other and isolated with no other houses nearby. Therefore a girl of 10 years can easily fall prey and become a willing victim and

remain silent. The Accused was a known elder who was almost a grandfather in seniority and age

49. Further, the acts of rape had taken place on several occasions. Thus on the first occasion the victim may have gone up to the Accused when called and she had been taken by surprise. However, on the second occasion she happened to be near the tree when the Accused had approached. Therefore she was taken by surprised again. But on the third, fourth and fifth occasions she admits going up to the mango tree when the Accused called her. She admits that she went willingly when so called. Now is this probable and possible? By this time she had two previous events where the Accused had raped her within a few days. In these circumstances one would expect her to run into her house if she saw the Accused calling her but she had gone to the Accused at the mango tree when he called her. She says that she did so because he threatened and she was in fear. Towards the end of her evidence she admitted responding to the shooing by the Accused and going up to the mango tree and that she went voluntarily. She does say she was afraid. It is in evidence that Accused had given her money at some stage.
  
50. Let's consider if this is plausible. She was a girl of just 10 years of age. The first two incidents she was no doubt taken by surprise but subsequently she appears to have gone to the Accused whenever he called her. It is in evidence that the Accused had given money to the victim. This evidence was not contradicted nor was it denied by the Accused but elicited in cross examination. This clearly shows that the Accused had been tactfully inducing the victim to come to him. As I said earlier the first two incidents certainly appear to have been committed with some force and coercion. Thereafter it is apparent that the victim has, whenever she was called gone to the Accused. This clearly and very strongly indicate that a little girl of 10 years who was generally left alone without her parents had initially been introduced to sexual pleasure forcefully but subsequently was induced to participate willingly. This is further buttressed by the fact of the Accused giving money. It is highly probable that a little girl of 10 years will fall pray and become a willing victim in these circumstances. The victim towards the end of her evidence admitting that she voluntarily went to him on the last three occasions clearly proves this.

51. In these circumstances it is highly probable and extremely possible that the victim may have begun to enjoy the novel sexual exposure and experience and will not divulge this to anybody especially if the Accused had also told her that she should not tell anybody. This was compounded by the fact of giving money to her. According to the evidence this seems to be exactly what had happened. Accordingly the victim not complaining immediately and concealing these acts of abuse is highly probable, firstly because she feared that her mother and grandmother will hit her and also the novel sexual experience and naivety. Accordingly considering the surrounding circumstances concealing and the delay in revealing to her mother is so explained and it is reasonable and acceptable.

#### False allegation and fabrication

52. The defence suggested that she's making a false allegations and it is a story fabricated by her mother. This was also suggested to her in cross examination. Let me consider if this suggestion is plausible and if it in any way create a doubt on the truthfulness of the prosecution witnesses. The reason or the motive for making the false allegation as suggested by the defence is to take revenge in view of the bitterness caused by the complaint made by Ima against the victim's mother and the case that was in the Magistrates court. It is common ground that in May 2020 Ima had forgiven Sanju and also withdrawn the Magistrates Court case against Sanju. It is the defence position that Sanju's husband Subash had met the Accused and sought forgiveness. Whatever may be the circumstances the parties have reconciled and the criminal matter had been withdrawn. That being so, the said case was no longer an operating or a live reason to take revenge. Further they have forgiven even assume that the complainant waited for the termination of the said criminal matter to take revenge then will they wait for three more months until August to take revenge? I do not think so.
53. Further, if the defence suggestion of fabrication is true, then Sanju has fabricated this story and had got a girl of 10 years to repeat it at the police station as well as in court. The story alleged to have been fabricated happens to be a complicated story of five incidents running into one week which is alleged to have happened five months before the date of complaint. In the first place, if someone is prompting a little girl of 10 years of age to make a false complaint on a fabricated story, you will expect it to be a simple and straight forward incident



of rape and you will not try to go back in time and create a complicated series of acts as seen in this case. Therefore fabricating a series of incidents going back in time certainly not of the nature and does not have the colour of a fabricated story. Secondly, even if such a story is fabricated one would expect a girl of 10 years giving evidence after 2 years to contradict herself in great detail. In the normal course of events it is not realistic to get a girl of 10 years to repeat a complicated fictitiously fabricated story and for her to respond to cross examination as done in this case. I did not see such contradictions either. As I said above, this is certainly not the form and nature of a false fabrication.

54. Considering this aspect further, I observe that even when a daughter is sexually abused there is a tendency and the desire to down play such incidents and conceal so as to avoid the stigma and shame that may be upon the girl for the rest of her life. In the present case too, the mother giving evidence said that she hit and punished the victim and did not complain because of embarrassment, and to avoid the questioning and the shame her daughter would have to face and endure if a complaint was so made. That being so, to my mind, making a false allegation of this nature in the circumstances of the present case highly improbable.

#### Delay in complaining to the police

55. If that be so then why did she complain in August? They have remained without complaining until August 2020, until certain rumours started to circulate that her daughter was raped by the Accused. It was this, that prompted the mother and the girl to complain. In the normal course of events this is extremely possible for the simple reason that with the rumours circulating concealing by not complaining was no longer possible as it has otherwise come out into the public domain.
56. In assessing the issues of delay of reporting, in *State v Serelevu* [2018] FJCA 163; AAU141.2014 (4 October 2018) at paragraph 24 – 27; held as follows

*[24] In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in Tuyford 186, N.W. 2d at 548 it was decided that:-*

*“The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”*

57. In the above circumstances the delay is thus explained and it is reasonable and acceptable. In the aforesaid circumstances I am satisfied and convinced that the evidence of the both the complainant and her mother is probable, credible and truthful.

#### Defence Case

58. The Accused gave evidence in this case. He admits living in that area for almost 40 years and had known the father of Subash and had known Subash from his birth. He had also known S.C.B Chand since her birth. Until 2017 they appear to have been living peacefully as neighbours. However, in 2017 due to a dispute between his wife Ima and Sanju, there was an estrangement. He admits that in May 2020 Subash made a plea for forgiveness and the said matter was settled, forgiven and the case was withdrawn. However, even thereafter they were not in talking terms. The Accused totally denies committing any act of any sexual nature and takes up the position that this is a false fabrication to take revenge. He admits that during 2020, he was not working and was at home. He totally denies having ever entered the premises of the victim or calling the girl to the mango tree. According to him Sanju was about to go to prison when they forgave and withdrew the case. Thus it is to take revenge that they are using the daughter to send him to jail.
59. The Accused was cross examined extensively by the prosecution. He denied committing any of the acts of rape as suggested. He admitted that the victim considered him as grandfather and she had trust in him. He admitted that Sanju was a market vendor but said that he is not aware as to the times when she and her husband were at work and the times the children were at home.

60. Towards the end of his cross examination he was asked why he forgave Sanju if they were enemies. He said that Subash came and pleaded that if his wife was sent to prison there would be no one to cook and feed the children. Because of this he had forgiven them.
61. The Accused did deny all five acts of rape as suggested by the prosecution. It was his position that he never committed these acts and he never came to the compound of the victim's house and that he never went up to the mango tree. It was a total denial and he alleged that this was a fabrication by the mother of the victim.

#### Evaluation of the Defence Evidence

62. The main position taken up by the defence is that of a false allegation and fabrication. In view of the above, evaluation I come to the finding that a fabrication or false allegation is extremely improbable. Therefore I am of the view that the main defence taken up is so improbable and thus it is in all probabilities false.
63. The Accused during cross examination made a great attempt to show that he does not know about the person's living in the victim's house and their routine activities. These two houses are situated in close proximity. The Accused had been living there for 40 years until 2017, they have been living without incident as neighbours. In the normal course of events, necessarily the Accused would naturally have known the general activities of a neighbour who was just living a hedge away from the house and which was visible. Thus the said denial is not realistic and cannot be true.
64. The Accused took up a firm position that he does not have access to the mango tree from his land. The Accused said and it was suggested that there was a slope and one could not could not approach the mango tree from his garden. The photographs and evidence does not show any insurmountable slope of such a degree. On a perusal of the photographs especially photographs 5 and 6 and the evidence it is apparent that a person can approach the mango tree from the extreme end of the Accused's land around the hedge. Therefore the Accused had not been truthful in this respect and is deliberately attempting to conceal the true position.

65. In the aforesaid circumstances the main defence of false allegation is improbable and it is false. Further the Accused was trying to deliberately and falsely deny the knowledge of the happenings and the general routine of the victim's household and the persons living there. The Accused was also attempting to mislead this court as regards the surroundings and the setting of the mango tree. As for his demeanour I observed that the Accused was making an attempt to deny and take up false positions when questioned in cross examination when he realised the improbability of his answers he changes his position. Accordingly I hold that the Accused's evidence is improbable and to that extent false. Accordingly I reject his evidence in its totality.
66. The fact that the defence is disbelieved or the defence evidence being rejected in no way will prove the charges. The burden of proof is with the prosecution to prove all ingredients of the charges beyond reasonable doubt. This burden does not shift to the defence in any way. Now I will proceed to consider the totality of the evidence to ascertain if all ingredients have been proved on the required criminal standard by the prosecution.

#### Proof of charges

67. Considering the totality of the evidence I would now consider if there is any doubt on the prosecution version or if the prosecution had proved the charges beyond reasonable doubt. The accused had taken up total denial and alleged that this is a false allegations. However, I have evaluated above and come to the conclusion that in the circumstances of this case it is highly improbable.
68. Further, by the time the complaint was made the main reason for their enmity the Magistrate's Court case had been forgiven and withdrawn. This had happened in May. This clearly leads to the inference that by May some degree of goodwill had been there between the Accused's family and the victim's family. If not one cannot expect Ima to forgive and withdraw the case. Correspondingly the victim's family is very unlikely to entertain a grudge of such a degree to falsely fabricate an allegation of this nature and magnitude which affects their own 10 year old girl child. As such the suggestion of fictitious false allegation is extremely remote and highly improbable.

69. In this back drop the reason which prompted the lodging the rape complaint, namely rumours in the village is realistic and possible. As such the reasons for the delay as evaluated above are acceptable. Thus the various contradictions and omissions and inconsistencies have resulted due to the delay and lapse of memory and confusion. The defence evidence and suggestions have failed to create any doubt on the prosecution case. Accordingly, this court can safely accept and act upon the evidence of the prosecution.
70. That being so, the evidence to prove these two charges emanates from the victim. According to her the Accused had inserted his penis into her vagina. She says that her tights were lowered up to the end of the knee and thereafter the Accused had come between her legs and got into a kneeling position. Then he has rubbed his penis on her private part when she felt his penis going in to her vagina. This evidence clearly proves that the Accused had penetrated her vagina with his penis.
71. The victim also says that the Accused licked the top part of her private part or the place she urinates from. The first two occasions she had certainly not consented and it was without her consent.
72. According to the prosecution evidence the victim had been 10 years old. Her birth certificate and her evidence proves this. Accordingly the prosecution has proved beyond reasonable doubt that the Accused himself has penetrated the vagina with his penis. Accordingly I hold that the representative count No. 2 of rape is proved beyond reasonable doubt.
73. The victim does say that the Accused put his tongue on her private part and licked. She did say that he licked her place where she urinates from. She also in further examination said that the top of her private part was licked. Therefore it is clear that the Accused had licked the entry of the vulva which is the outer most margin of the vulva proper. Her neighbour of advanced age almost old enough to be her grandfather licking top of her private part the edge of her vulva in this manner and circumstances certainly is not and cannot be decent by any standard of decency. This is without doubt an act of asexual a nature. The victim had on the first and the second occasions certainly not consented to these acts. This act as proved is certainly involuntary contact of a 'sexual' nature that has occurred through the Accused's

use of force, and coercion without the victim's consent. This evidence proves beyond reasonable doubt all the ingredients of the representative count No. 1 of sexual assault as charged.

**Conclusion**

74. In the circumstances, I hold that the prosecution has proved both counts No. 1 and No. 2 as charged beyond reasonable doubt. Accordingly, I find Accused guilty of the representative Count No. 1 of Sexual Assault and the representative Count No. 2 of Rape separately and the Accused is hereby convicted of the said Counts No. 1 and 2 separately.



**At Labasa via skype**

02<sup>nd</sup> November 2022

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Jiten Reddy Lawyers for the Accused