

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 5 of 2022

STATE

vs.

JOSEFA CAVUILATI BOSEIKADAVU WAQABACA

Counsel: Ms. A. Vavadakua for the State
Ms. M. Filipe & Ms. L. Ratidara

Date of Hearing: 6th & 7th December 2022

Date of Closing Written Submissions: 20 December 2022 and 16 January 2023

Date of Judgment: 16th January 2023

JUDGMENT

Introduction

1. The Director of Public Prosecutions filed the Information dated 27th January 2022 and subsequently tendered amended information dated 7th December 2022. The charges against the Accused are as follows:

COUNT ONE

Statement of Offence

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

Particulars of Offence

JOSEFA CAVUILATI BOSEIKADAVU WAQABACA between the 1st day of January 2021 and the 30th day of April, 2021 at Valelevu, in the Central

Division, penetrated his penis into the vulva of CT, a child under the age of 13 years.

COUNT TWO

Statement of Offence

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

Particulars of Offence

JOSEFA CAVUILATI BOSEIKADAVU WAQABACA between the 19th day of September, 2021 and the 07th day of December, 2021 at Valelevu, in the Central Division, unlawfully and indecently assaulted CT by forcefully kissing and biting her lips and her neck.

COUNT THREE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (b) (ii) of the Crimes Act, 2009.

Particulars of Offence

JOSEFA CAVUILATI BOSEIKADAVU WAQABACA between the 19th day of September, 2021 and the 07th day of December, 2021 at Valelevu, in the Central Division, procured CT, without CT's consent, to witness an act of gross indecency on **JOSEFA CAVUILATI BOSEIKADAVU WAQABACA's** mobile phone.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

JOSEFA CAVUILATI BOSEIKADAVU WAQABACA between the 19th day of September, 2021 and the 07th day of December, 2021 at Valelevu, in the Central Division, unlawfully and indecently assaulted CT by sucking her breast.

COUNT FIVE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (b) (ii) of the Crimes Act, 2009.

Particulars of Offence

JOSEFA CAVUILATI BOSEIKADAVU WAQABACA between the 01st day of January, 2021 and the 31st day of December, 2021 at Valelevu, in the Central Division, procured SR, without SR's consent, to witness an act of gross indecency by removing his pants in the presence of SR, whilst telling her to lick his genitals.

COUNT SIX

Statement of Offence

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

Particulars of Offence

JOSEFA CAVUILATI BOSEIKADAVU WAQABACA between the 01st day of January, 2021 and the 31st day of December, 2021 at Valelevu, in the Central Division, unlawfully and indecently assaulted SR, by rubbing his toes on SR's vaginal area, over her clothing.

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

JOSEFA CAVUILATI BOSEIKADAVU WAQABACA between the 01st day of January, 2021 and the 30th day of April, 2021 at Valelevu, in the Central Division, unlawfully and indecently assaulted SR, by rubbing his penis on top of her vaginal area, over her clothing.

2. The trial commenced on 06 December 2022 upon reading and explaining the charges the accused pleaded not guilty to all the counts.

3. The prosecution case was closed with the evidence of with 3 witnesses. As it appeared to this court that there was prima facie evidence of the charges, the defence was called for and the rights of the accused were explained. The accused opted to remain silent and did not call any witnesses. This court having read the closing written submissions, will now endeavor to pronounce the judgment.

Ingredients of the offences

4. For the accused to be found guilty of rape count No. 1 of the present case based on sections 2(b) and (3) of Section 207 that in addition to the date and place stated in the count the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused,
- (ii) penetrated the complainant's vulva with his penis,
- (iii) complainant is less than 13 years of age'

If CT is proved to have been under 13 years of age consent is not an issue. The slightest penetration of the complainant's vulva by the accused's penis is sufficient to satisfy penetration.

5. For the accused to be found guilty of the counts 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 on the date and place specified in the respective charge, did unlawfully and indecently assault the victim as described in such charge.
6. 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.
7. The ingredients of Sexual assault under the 1st 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.

Burden of Proof

8. The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts 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 remains silent.

9. Admitted Facts

1. **THAT** the person charged in this case is **Josefa Cavuilati Boseikadavu Waqabaca**, [hereinafter referred to as "Josefa"] who was 64 years old at the time of the alleged offending referred to on the Information.
2. **THAT** the complainant in this matter is CT [hereinafter referred to as "C"] who was 12 years old at the time of the alleged offending referred to on the Information.
3. **THAT** 'S' is the younger sister of CT.
4. **THAT** "S" and "C" are the Accused person's wife's brother's children.
5. **THAT** during the period of the alleged offending as mentioned on the Information, the Accused person's wife was deceased.
6. **THAT** during the period of the alleged offending referred to on the information, " S" and "C" were staying with the Accused because their father was sickly and then died and their biological mother too had left them with the Accused and never went back to check up on them.
7. **THAT** the period of the alleged offending as referred to on the Information was during the period that the schools were closed due to the covid-19 lockdown.
8. **THAT** this matter was reported to the Valelevu Police Station on the 15th December 2021, by the Accused person's step-son Semiti and his wife, Camari.

9. **THAT** after Semiti and Camari reported this matter to the Police, they then moved out of the Accused Person's house and moved to a settlement in Vatuwaqa.

The Prosecution Case

Prosecution Witness 1 - Camari Adimaiyacata

10. PW1 Camari Adimaiyacata is married to Semi Tikalala (Mili) and she has four children between the ages of 6 and 1 year. Apart from these 4 children she is also looking after the two victims and their younger brother Isireli. The Accused is the step-father of her husband. The father of the victims was the brother of the Accused's wife who had died sometime before. The mother of the victims is said to be at St. Giles Mental Hospital. The two victims and their brother have been in the care and looked after by Camari for almost 6 years prior to the incident. Her husband has been employed and goes out to work everyday whilst she remain at home with the children. They have been living in one of the room of the house owned by the Accused. There appears to have been 4 to 5 rooms and the Accused was occupying one of them exclusively and about 20 persons have been living in this house.
11. The Covid lockdown have begun in April 2021 and until such time they were all living in this house. During the lockdown Mari with the 7 children have shifted to Verata their village and returned on 17th September, 2021 back to the Accused's house. However, after returning she had sent the victims to her sister's house at Vatuwaqa as they complaint the Accused were doing something to them. It is also in evidence that after she was told of some acts committed by the Accused she had informed the husband who then confronted the Accused. The Accused has denied but admitted that he only kissed and hugged him however has apologized and they have reconciled. This had taken place in the presence of the whole family. The Accused had been informed that if there be a repetition, a complaint will be made to the police.
12. On the 5th December, 2021 they have all been at the house and on the 6th December she had gone to the Max Value Supermarket with CT. Whilst there CT had told that the Accused had done something to her breast and it was painful. Camari immediately called her husbands who had come to the supermarket and then complained to the police. In cross-examination she admitted that she did not witness or see anything happening to CT and ST. She also admitted that none of the other children or the adults

in the house told anything about these incidents. In re-examination she said that others in the house were between 18 and 24 years of age and her children are much younger to the victims and they are between 6 years and 1 year.

13. The two victims CT and SR and their guardian Camari Adimaiyacata were called on behalf of the prosecution. The two victims are siblings their father had died several years before the incidents and the mother is in a mental hospital and the children were left with Camari who is also referred to as Mari. The children have been living at Valelevu in the house owned by the Accused. Accused is the step-father of Mari's partner Miji. Apart from Mari there were about 20 persons living in this house which had 4 rooms. Mari was living with her partner Miji and four of her children. The youngest was a very small child of less than one year.

Prosecution Witness 2 - SR

14. PW2 SR was called next and according to her when she was living at Valelevu in the Accused's house before the lockdown she along with her sister CT were on the bed watching television in the Accused's room. Her brother was on the floor. The Accused had come to the room and climbed onto the bed and got onto her and had laid on top of her. She had been lying on the bed upright and she had felt the uncle's balls touching her pipi. She explained pipi is where she urinates from and the balls is used to urinate. She says that after he lay on top of her and he rolled over to the bed. Both of them were wearing their clothes.
15. After this incident she said on another day when Mari was out shopping she was playing with the children outside the house. The Accused had called her and asked her to come into his room and wanted her to close the door. Then he had told her to massage him and when she was massaging him the Accused was scrubbing her pipi with his toe, she says.
16. She also said that on another day when she went into his room to give him the roll of cigarettes he had wanted her to close the door and then had lowered his pants and told her to lick his balls and he wanted her to come up to him. She had not gone but refused. She had started shaking when the Accused had told her to get out. She admits that though the pants were lowered he was still was wearing his underwear and she did not see his balls.

17. After some time she had told this to Mari and CT. she had first told CT and both of them had told Mari. Mari had informed Miji however, these incidents have not stopped even after that. She identified the Accused in open court. In cross-examination she admitted that the Accused did have a bad knee and that when the Accused came to the room when they were watching television they did not move from the bed that day. It was suggested that the Accused did not ask her to lick his ball and that he did not scrub her pipi with his leg. She denied the same.

Prosecution Witness 3 - CT

18. CT and her sister SR were living with Mari and her three children in one of the room's in this house. Miji used to go to work and Mari attends to household chores. Prior to the pandemic lockdown the two victims have been at home on a particular day when Miji was out at work and her mother was out hanging clothes, uncle Boss had called her into his room. After calling her in the Accused had touched her breast and also sucked them. She also goes on to say that this was a regular happening and it also happened on the 06th December, 2021 as her breast was painful she had disclosed this to Mari when they went to the Max Value Shop on that day. Therefore, she remembers this day clearly.
19. One a particular day her uncle Boss had shown her a bad movie on his mobile phone in his room. In that movie she had seen one man down and the woman lying on top of the man doing the bad thing by which she meant that they were having sex. She went on to describe that these two were not wearing any clothes. She had wanted to play a game on the phone when uncle Boss had given the phone to her and then tapped on the phone and the movie had then started. Whilst this bad movie was being played her sister had come in when the uncle had taken the phone. CT explained that she did not want to watch that movie which was shown by the uncle. This had happened during the lockdown.
20. Prior to the lockdown on a particular day Mari had gone to school to drop off her worksheet. When uncle Boss had asked her where Mari was and she had told where she went. Then uncle Boss had called her to the room and asked her to close the door. Then asked her to remove her panty and shorts and to sit on top of him. She had been standing still when uncle Boss had dragged her and put her on top of his leg and then

top of him. Uncle had been in a pair of shorts which he had pulled down a bit and pulled her against him. Then she had felt some pain in her female private part. The uncle had been using his male private part and had put it into her female private part. She does say that he put it in a little bit. Uncle Boss had been holding onto her waist when he was doing this.

21. At this moment her sister happen to call her from outside. Then Buna (daughter of Mari) had pushed the door open and seen CT on the uncle and she had threatened to tell this to her mother and gone out of the room but uncle Boss had called her. By this time CT had been told to get dressed up. When Buna came in uncle Boss had told her that he will never give her anything including the phone if she told this to her mum and had left the room. CT had not disclosed this to Mari for the next one to two months. The reason not to disclose was uncle Boss threat that he will not give anything including the phone to her and also the threat to smack her. However, after sometime both CT and SR have together informed Mari of certain incidents. Thereafter, Mari and Miji have spoken to uncle Josefa. However, uncle Josefa had denied doing anything. She identified the Accused in open court as been uncle Boss whom she also referred to as uncle Josefa.
22. In cross-examination it was suggested that there were other children in the house which was admitted. It was also suggested that uncle Boss did not show any bad movie, and that he did not suck her breast, and the incident removing of her panty in his bedroom did not happen and uncle did not do anything that she told. CT denied all these suggestion and reiterated that all those did happen.
23. Upon the close of the prosecution case the defence was called for and the Accused remained silent which was his right as such no adverse inference can be drawn. In cross-examination it was suggested that the alleged acts did not take place and to that extend the defence position is one of denial. That being so I will now proceed to evaluate the credibility and reliability of the evidence of the prosecution witnesses.

Evaluation of the Prosecution Evidence

24. As both the victims were of a young age and the prosecution generally questioned to ascertain their understanding and competence after which this court was satisfied that both the victims did understand the difference between the truth and falsehood and the

nature of the proceedings in this court. They were competent and of sufficient understanding as such both of them were then sworn and gave sworn evidence.

25. There were no contradictions marked or omissions raised from any of the witnesses. Some of the alleged incidents have taken place prior to the lockdown in April 2021. However, the complaint had been made to the police on the 6th of December 2021. There is a delay. Delay *per se* will not defeat a complaint if there is a reasonable explanation for the delay.
26. At the outset I would consider the evidence to identify the charges in respect of evidence is available. The amended information contains 7 counts. Counts 1 to 4 are in respect of alleged acts committed on PW3 CT. Similarly counts 5, 6 and 7 are in respect of PW 2 SR. at the outset I will consider the evidence of PW3 CT. When she was at the Accused's house at Valelevu before the lockdown her aunt Mari had gone to school to drop a worksheet when the Accused had called her into his room and got her to remove her panty and shorts and then asked her to sit on him. She had been reluctant but the Accused had dragged her onto him. Accused had removed his shorts at this moment. When she was on him facing each other she had felt pain in her vagina when the Accused using his male private part and putting it into her female part (evidence at pages 61 and 62). This evidence covers the alleged act referred to in count number 1.
27. It is her evidence that after the lockdown when she was at the Accused's house the Accused did show her a bad movie on his mobile phone. She explains that the movie depicted a man and woman without clothes and the man was down and the woman was lying on top having sex. While this movie was being shown her younger sister had come in to the room and thus the movie had been stopped she specifically states that she did not want to watch the bad movie and the Accused pretending to show her game has tapped on the phone and started this bad movie. This conduct by an uncle is certainly not decent when objectively viewed by right thinking members of the society. She had not consented. (Pages 57, 58 & 59 of the transcripts). This evidence covers the ingredients of count number 3.
28. PW3 CT also had in her evidence narrated that the Accused sucks her breast at page 56 of the transcript she does say that even after the lockdown was over he continued to suck her breast and she clearly remembers the Accused sucking her breast on the 6th of December

last year (2021). That afternoon she had gone to the Max Value shop with Marie and told her of this incident after which they have go and reported the matter to the police. Thus she claims to remember this incident clearly. She had clearly stated that she did not like this and she did not consent. This conduct by an uncle is certainly not decent when objectively viewed by right thinking members of the society. This covers the ingredients of count 4.

29. As regards count number 2 the allegation of sexual assault is based on the act of forcefully kissing and biting her lips and neck. On the consideration of entirety of PW3 CT's evidence she does not specifically shape or narrate that the Accused forcefully kissing and biting her lips and neck. However, she had repeatedly said that the Accused wanted her to put her tongue out and he sucked her tongue. It appears on the consideration of the totality of her evidence that this act of sucking her tongue may have been followed by the other acts of kissing biting the lips and neck. However, after a lapse of time when she giving evidence it is probable that she may have forgotten or by oversight not narrated the details of sucking her tongue. However, the end result is that the specific act as alleged in count number 2 has not been proved in evidence. Accordingly, there is sufficient evidence in respect of the acts alleged in counts 1, 3 and 4, but not in respect of count number 2.
30. Now I will consider counts 5, 6 and 7 which are alleged to have been committed in respect of PW2 SR. All these counts are allegation of sexual assault. Count 5 refers to an act of removing the Accused's pants in the presence of this whilst telling her to lick his balls (genitals). SR in her evidence says that whilst at Valelevu in his bedroom the Accused had told her to lick his balls. On that occasion she had brought a cigarette roll for the Accused and gone into the room to give it to him. The Accused had then closed the door and told her to lick his balls and she had just been staring at him. When he wanted her to come to him she had disagreed and she had started shaking (shivering) when the Accused had asked her to go out. However, she admits that she did not see his ball on that day though the Accused had pulled down his pant upto his knees as his underwear was still on. This evidence covers the ingredients of count number 5 as amended.
31. As for the evidence in respect of counts 6 and 7 the acts alleged are rubbing his toe on her vaginal area over her clothing and rubbing his penis over his vaginal area over her clothing. According to her evidence she does say that on one occasion when she was

massaging his legs the Accused has used his legs and scrubbed her pipi with his toe. The charge alleges that the Accused rubbed his toes on her vaginal area. This had happened when she was wearing her clothes. Further, it is not clear at whether the Accused's leg rubbed against her vaginal area accidentally or deliberately.

32. Similarly, she also narrates that on one occasion when she was in the Accused's room on his bed, watching TV with her sister the Accused had walked into the room and had climbed onto the bed while so climbing, the Accused had rolled over SR. It appears that when he so rolled over his genital area (penis) has touched SR's vaginal area over the clothes. The victim admits that the Accused did have the knee problem and it was difficult for him to get on the bed. She also admits that she and her sister remained without moving. Apart from her sister there have been some other children in the room. In these circumstances it is not clear if the touching of the genital area of the Accused was accidental when he attempted to get onto the bed. There is certainly an uncertainty of which the benefit the Accused should get.
33. Thus on the consideration of PW2 SR's evidence there is evidence in respect of count number 5.
34. However, though there is evidence of the happening of the alleged acts as referred to as in count 6 and 7 there is a serious doubt as to if these acts of rubbing his legs and his penis of the vaginal area over their clothing was deliberate or accidental. Further, there is insufficient evidence of the act alleged in count number 2 as afore stated. As such I am of the view the prosecution has failed to lead sufficient evidence to prove counts 2, 5, 6 and 7. However, there is evidence in respect of count 1, 3, and 4 to be considered.

Delay in Complaining

35. The alleged incidents have been taking place between 1st January, 2021 and 07th December, 2021 the complaint to the police was made on 7th December, 2021. There is thus a delay. It is now necessary to consider if there is a reasonable explanation for this delay. The two victims have brought to the notice of Camari of some incidents of a sexual nature being committed on them by the Accused. When this came to light Camari upon informing her husband Mili have raised the matter with the Accused. The Accused at that stage has denied but had apologized and has reconciled with the family giving an undertaking that he will not repeat any such acts. Since then the victim along

with Camari and family have gone to their village during the lockdown. However, upon returning these acts and incidents appear to have resumed. Camari had even kept these two children at another house but as the landlady of that neighbouring house had insisted that the children should be in their home they have been thus brought back to the Accused's house.

36. This sequence of events clearly proves that the two victims have divulged to Camari incidents of sexual nature suffered by them long before the formal complaint to the police was made. Further, it is also in evidence that there have been an effort to reconcile this matter. However, in view of the subsequent and continuous acts committed by the Accused, Camari and Mili have been compelled to complain to the police. In the normal course of events this is extremely possible and reasonable.
37. 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.”

In the above circumstances to my mind the delay is thus explained and it is reasonable and acceptable.

38. As observed above there were no contradictions or omissions on the evidence of the two victims as well as Camari. However, it was in evidence that apart from the two victims there were several other children in the house and no other had made a similar complaint against the Accused. Based on this it was submitted on behalf of the Accused that it is unusual that only the two victims have made such complaints. I will now consider this issue. The other young children in the house are the children of Camari

and Mili and the others are very much older around 18 years of age. Be that as it may what I observe is that all the other children who were living in the house of the Accused have their own parents and family. As for the two victims their father had died some time ago and the mother was not with them but at the Saint Giles Mental Hospital. No doubt they were cared for and looked after by Camari but they are orphans to that extent. They are vulnerable as such and appears to be at the mercy of the Accused. The Accused have been providing them with various needs, and accommodation. In this backdrop and circumstances such children are more likely to succumb to authority and remain silent and suffer abuse. As such the Accused selecting, isolating and abusing these two victims is highly probable because he has an inherent guarantee of secrecy and control.

39. On the consideration of the totality of the evidence I find that the Accused as the owner of the house has provided accommodation to these victims and also to Camari and her family. The Accused had been providing various material things and to some extent looking after their welfare. There is no evidence of whatever nature that indicates of any displeasure or other reason for Camari or the victims to make a false allegations. In the contrary in these circumstances it is more probable that they would not complain promptly even if they suffer some injustice because to do so would be to deny their accommodation and the place to live. Accordingly, the circumstances by themselves defeat and negate any possibility of making a false allegations of this nature against the Accused. In the fore circumstances I am satisfied that the prosecution witnesses are truthful and the evidence is credible.

Credibility and Reliability

40. In the aforesaid circumstances, I am of the view that witnesses in this matter are credible and truthful witnesses. Merely by deciding that the evidence of these witnesses to be credible will not be sufficient to determine the testimonial trustworthiness of the witness. As I have previously stated in State V Solamani Qurai HAC 14 of 2022, in considering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the credibility or veracity and the other is the accuracy or reliability. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relates to the actual accuracy of the witness's testimony. The accuracy of a witness's

testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is an honest witness, may however be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526): 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288].

Reliability

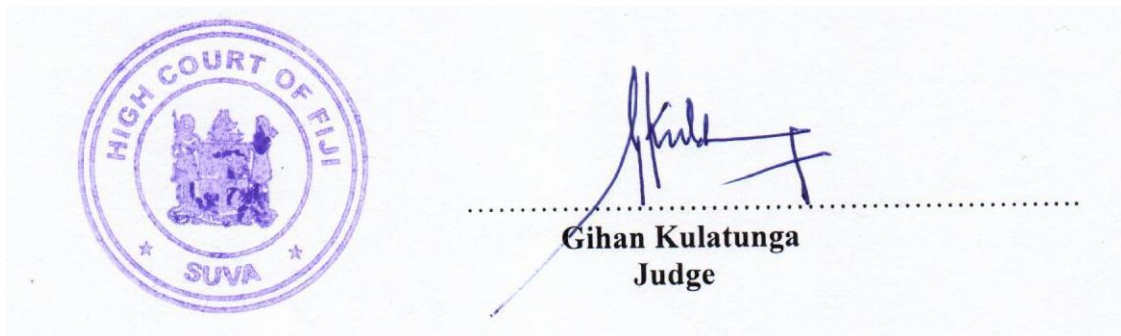
41. In the present case witness number 2 SR's evidence has raised some uncertainty in my mind as far as reliability is concerned. That is count number 5 in its original form stated that the Accused has exposed his penis. However, in evidence SR's position was that she did not see the Accused's penis at any point of time. Thus, count number 5 was amended to read as removing his pants and telling her to lick his genitals. In the course of the examination in chief the prosecutor did question giving the impression that SR has previously stated that she had seen the penis. Thus there seems to be some variations from her original version. The original form being so stated supports this position.

42. Further, as far as the other two acts are concerned namely scratching the vagina with the toe and rubbing his penis on top of her vaginal area, though narrated by SR there are an uncertainty as to whether those acts were deliberate or accidental. Considering the demeanour of SR I observe that she appears to add and narrate some things which she believes in explaining the event. She is certainly not untruthful. It is just that due to her immature age, the lapse of time and may be discussing this matter with others have formed the belief in her mind that all alleged acts of contact with the Accused are of a sexual nature. Thus, on an objective evaluation of the totality of her evidence especially the demeanour I have serious reservation as to the reliability of her evidence. In a criminal case of this nature I am required to give the benefit of this to the Accused. Accordingly, I am of the view that though the facts of the act alleged in count number 5 is narrated by SR her evidence is not safe to rely on.

43. Accordingly, I hold that the prosecution has failed to prove counts number 5, 6, and 7 as alleged. However, as regards the evidence of CT she has precisely and clearly narrated the incidents in respect of counts 1, 3 and 4 of the information. Her demeanour as well as attendant circumstances clearly demonstrated she was well possessed and narrated exactly what she had observed and experienced. Accordingly, her evidence is reliable. It is proved and admitted that she was less than 13 years at the time of incident. Accordingly, I hold that the offence of Rape as charged in count number 1, the offence of Sexual Assault as charged in count number 3 and the offence of Sexual Assault as charged in count number 4 have been proved beyond reasonable doubt.

Conclusion

44. Accordingly, I am satisfied that the prosecution has proved counts number 1, 3, and 4 beyond reasonable doubt as charged. However, the prosecution has failed to prove counts number 2, 5, 6 and 7. And accordingly I find the Accused guilty of count 1 (Rape), count 3, and 4 (Sexual Assault) and convict the Accused separately in respect of the said counts. However, I acquit the Accused from counts 2, 5, 6 and 7.



At Suva

16th January, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused.