

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 17 of 2021**

**STATE**

**V**

**VERETI TIKODRAMAI**

**Counsel** : Ms. Saini Naibe for the State  
Mr. Paula Gade for the Accused

**Dates of Trial** : 16-18 November 2022

**Closing Submissions** : 6 January 2023

**Judgment** : 22 February 2023

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

## **JUDGMENT**

[1] As per the Amended Information filed the Director of Public Prosecutions (DPP) has charged the accused, Vereti Tikodramai, with the following offences:

### **COUNT 1**

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

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

***Particulars of Offence***

**VERETI TIKODRAMAI**, between the 1<sup>st</sup> day of July 2020 and the 31<sup>st</sup> day of December 2020, at Vatukoula, in the Western Division, unlawfully and indecently assaulted **KLLL**, by touching her breasts.

**COUNT 2**

***Statement of Offence***

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

***Particulars of Offence***

**VERETI TIKODRAMAI**, between the 1<sup>st</sup> day of July 2020 and the 31<sup>st</sup> day of December 2020, at Vatukoula, in the Western Division, on an occasion different from Count 1, unlawfully and indecently assaulted **KLLL**, by touching her breasts.

**COUNT 3**

***Statement of Offence***

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

***Particulars of Offence***

**VERETI TIKODRAMAI**, between the 1<sup>st</sup> day of July 2020 and the 31<sup>st</sup> day of December 2020, at Vatukoula, in the Western Division, penetrated the vagina of **KLLL**, with his tongue, without her consent.

**COUNT 4**

***Statement of Offence***

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

***Particulars of Offence***

**VERETI TIKODRAMAI**, between the 1<sup>st</sup> day of July 2020 and the 31<sup>st</sup> day of December 2020, at Vatukoula, in the Western Division, penetrated the vagina of **KLLL**, with his finger, without her consent.

## COUNT 5

### *Statement of Offence*

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

### *Particulars of Offence*

VERETI TIKODRAMAI, between the 1<sup>st</sup> day of July 2020 and the 31<sup>st</sup> day of December 2020, at Vatukoula, in the Western Division, had carnal knowledge of KLLL, without her consent.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 3 days. Thereafter, the Learned Counsel for the State and Defence 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 two count of Indecent Assault, contrary to Section 212 (1) of the Crimes Act; two counts of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act, and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

[6] The first and second counts against the accused are charges of Indecent Assault, contrary to Section 212 (1) of the Crimes Act. The offence of Indecent Assault is defined in Section 212 (1) of the Crimes Act as follows:

*(1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.*

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

- (i) The accused;
- (ii) During the specified period (in this instance between the 1 July 2020 and the 31 December 2020);
- (iii) At Vatukoula, in the Western Division;
- (iv) Unlawfully and indecently assaulted KLLL, the complainant, by touching her breasts.

[8] Similarly, in order to prove the second count of Indecent Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this instance between the 1 July 2020 and the 31 December 2020), on an occasion different from Count 1;
- (iii) At Vatukoula, in the Western Division;
- (iv) Unlawfully and indecently assaulted KLLL, the complainant, by touching her breasts.

[9] To further elaborate upon these elements in relation to the first two counts. 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 offences.

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

[11] The accused would be guilty of Indecent 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 breasts by the accused with his hands, is an indecent act and thereby amounts to Indecent Assault.

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

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

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

[14] 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.*

[15] 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.

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

[17] 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; while

the accused has been charged in count 4, for penetrating the vagina of the complainant with his finger.

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

- (i) The accused;
- (ii) During the specified period (in this instance between the 1 July 2020 and the 31 December 2020);
- (iii) At Vatukoula, in the Western Division;
- (iv) Penetrated the vagina of the complainant KLLL, 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.

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

- (i) The accused;
- (ii) During the specified period (in this instance between the 1 July 2020 and the 31 December 2020);
- (iii) At Vatukoula, in the Western Division;
- (iv) Penetrated the vagina of the complainant KLLL, with his finger;
- (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]** Similarly, in order to prove the fifth count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this instance between the 1 July 2020 and the 31 December 2020);
- (iii) At Vatukoula, in the Western Division;
- (iv) Penetrated the vagina of the complainant KLLL, 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.

- [21] 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.
- [22] The second element relates to the specific time period during 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.
- [23] The fourth element involves the penetration of the complainant's vagina, with the accused's tongue (in respect of count 3); the penetration of the complainant's vagina, with the accused's finger (in respect of count 4) and the penetration of the complainant's vagina, with the accused's penis (in respect of count 5). 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 tongue, finger and penis, respectively, to any extent.
- [24] 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 tongue (in respect of count 3); that the accused penetrated the complainant's vagina, with his finger (in respect of count 4) and that the accused penetrated the complainant's vagina, with his penis (in respect of count 5), without her consent.
- [25] 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.

[26] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his tongue (in respect of count 3); that the complainant did not consent for the accused to penetrate her vagina, with his finger (in respect of count 4) and that the complainant did not consent for the accused to penetrate her vagina, with his penis (in respect of count 5); 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.

[27] 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 just above the age of 13 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 23 May 2007].

[28] 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 Indecent 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**

[29] 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.*

[30] Accordingly, the prosecution and the defence have consented to treat the following facts as “Agreed Facts”:

1. The complainant in this matter is one KLLL, 13 years old, student of Church Road, Vatukoula.
2. The complainant is also known as L.
3. The defendant in this matter is one Vereti Tikodramai, 74 years old, unemployed of Church Road, Vatukoula.
4. The complainant’s parents name are Sainivalati Matairi and Vaseva Vokele.
5. The complainant has three other siblings in which she is the second eldest.
6. The complainant and the defendant’s residence is in a close proximity (walking distance).
7. The defendant usually went to fetch water from the complainant’s residence at (Vatukoula) back in the year 2020.
8. The complainant is related to the defendant through her paternal links.
9. The complainant has a neighbor who also lives in Church Road namely Sainimili Kidomoce.

The following documents are tendered by consent:

1. The Birth Certificate of the complainant, namely KLLL (Date of Birth 23<sup>rd</sup> May 2007).

[31] Since the prosecution and the defence have consented to treat the above facts as “Agreed Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

## Case for the Prosecution

[32] The prosecution, in support of their case, called the complainant (KLLL), and her neighbour, Sainimili Kidimoce. The prosecution also tendered the Birth Certificate of the complainant as Prosecution Exhibit PE1.

### [33] Evidence of the complainant KLLL

- (i) *During the recording of the complainant's evidence a screen was placed so that the complainant could not see the accused and her evidence was recorded in a closed court. Court observed that the complainant was having a stammer.*
- (ii) *The complainant testified that she is residing at Loloma in Vatukoula with her parents and her younger siblings. As per the Agreed Facts it is agreed that the complainant has three other siblings and she is the second eldest. The name of her three siblings are Joana, Isoa and Eperama.*
- (iii) *The complainant is currently attending Nilsen College in Vatukoula and is in Form 3.*
- (iv) *She confirmed that her date of birth was 23 May 2007. Thus, she is currently 15 years old. A copy of her birth certificate was tendered to Court as Prosecution Exhibit PE 1.*
- (v) *The witness testified that in the year 2020 she was staying at Church Road in Vatukoula. In 2020, she was a Class 7 student at Vatukoula Primary School.*
- (vi) *The complainant confirmed that in July 2020 she was residing at Church Road in Vatukoula. She testified to the events which took place during that particular time. She said: "I was sleeping. My grandfather came and touched my breasts".*
- (vii) *The witness explained that she was sleeping on the bed, in the room, with her elder sister Joana. Her other two siblings and her mum and her dad were sleeping in the master bedroom. In her house at Church Road, there were two rooms – the master bedroom and the room she was sleeping.*
- (viii) *She said the name of her grandfather is Vereti, the accused. She agreed that her grandfather Vereti lived about 10 metres away from her house. It is an agreed fact that the complainant and the accused's residence is in close proximity (walking distance). It is also agreed that the accused usually went to fetch water from the complainant's residence at Vatukoula in the year 2020. It is further agreed that the complainant is related to the accused through her paternal links.*
- (ix) *When asked how she knew it was her grandfather Vereti who was touching her breast, the witness said: "I saw his face".*
- (x) *At the time she had been wearing a bra and a top. The accused had touched her breast on top of her clothes. The witness demonstrated as to how the accused had touched her breasts on top of her clothes.*
- (xi) *The complainant was then asked the following questions and she answered as follows:*

*Q. How did you feel at that particular moment when your grandfather had touched your breasts?*

*A. I stood up, I saw him touching my breasts.*

*Q. When did you stand up?*

*A. From the bed.*

*Q. When you stood up from the bed, what did you see?*

*A. He was touching my breasts.*

*Q. How did that make you feel?*

*A. I felt him touching me.*

*Q. What did you do when you had felt this?*

*A. I told him to go inside the house.*

*Q. What did he then do?*

*A. He went to watch movies.*

*Q. Where did he go to watch movies?*

*A. In the house.*

*Q. What was the time you and Joana went to sleep?*

*A. 8.00 in the night.*

*Q. What did you then do?*

*A. I closed the door.*

*(xii) The complainant testified that although the light inside the room had been switched off, the light in the washroom was on and the door to the room was open. Therefore, she knew it was her grandfather Vereti who had touched her breasts.*

*(xiii) The witness was then asked the following questions and she answered as follows:*

*Q. Apart from what your grandfather Vereti did that night, do you remember any other incident which you encountered with your grandfather Vereti?*

*A. Yes.*

*Q. Can you tell the Court what happened?*

*A. In the toilet.*

*Q. What happened inside the toilet?*

A. *He touched me. Then he put his hand in my private part.*

Q. *Is there anything else he did?*

A. *Then he licked my private part with his tongue.*

Q. *Where did he touch you?*

A. *My private part.*

Q. *What were you doing inside the toilet?*

A. *I went to pee (urinate).*

Q. *Which toilet was this?*

A. *Inside the room.*

Q. *Whose toilet?*

A. *Toilet – myself and Joana’s room.*

Q. *Whose house is the toilet located?*

A. *Our house.*

Q. *What time of the day was this?*

A. *After 9.00 a.m. (in the morning).*

Q. *Was there anyone with you on that particular day?*

A. *Yes. My mum and others.*

Q. *Where exactly were your mum and others at the time?*

A. *On the stairs behind the kitchen.*

Q. *When you had gone inside to pee, was there anyone else in the toilet?*

A. *No.*

Q. *When did your grandfather Vereti come in the toilet?*

A. *I was in the toilet and he followed.*

Q. *What then did you do?*

A. *I stood up and he came and touched me.*

Q. *Where did he touch you?*

A. *He touched my breasts.*

Q. *Were you wearing any clothes or not?*

A. *Yes.*

*Q. What were you wearing?*

*A. A top.*

*Q. Did he touch under your top or over you top?*

*A. On top of my clothes.*

*Q. How did he put his hand on your private part? How did he do that?*

*A. He poked it.*

*Q. Were you wearing anything else apart from the top?*

*A. My bra.*

*Q. What did he do to put his hand in your private part?*

*A. He poked my private part with his hand.*

*Q. What else did he do?*

*A. He used his tongue on my private part.*

*Q. What were you wearing at that particular moment?*

*A. Shorts.*

*Q. At the time your grandfather did this to you, were you wearing your shorts?*

*A. I was wearing it.*

.....

*Q. When your grandfather Vereti had poked your private part using his hand and also used his tongue, was it outside the shorts or inside (under) the shorts?*

*A. Inside the shorts.*

*Q. Do you recall at that time was there any conversation or did your grandfather tell you anything before he did those acts?*

*A. Yes.*

*Q. What did grandfather Vereti tell you?*

*A. He told me not to tell anyone.*

*Q. When you said he poked your private part with his hands, how did you know that he used his hands to poke your private part?*

*A. I saw him poke my private part with his hands.*

*Q. How do you know that your grandfather used his tongue on your private part?*

*A. I saw him.*

- (xiv) When asked to explain what she meant by private part the witness said it is from where the children come out from. When asked where you urinate from she said: "our mimi."*
- (xv) The witness said that the accused had poked her private part with his hand and also used his tongue on her private part for 2 hours.*
- (xvi) After the incident she had gone inside the house and the accused went to watch movies in the house. The witness said that she did not tell anyone about what happened to her. When asked why she did not do so, she said because the accused had told her not to tell anyone.*
- (xvii) The complainant testified next to an incident which took place in a vacant house. She said it was her uncle's house. The witness said she was sitting outside the house. The accused had been in the house and had called her and told her to come into the house. She had complied. The accused had then touched her breasts. When asked what else the accused did at the time, the complainant said: "He touched my private part."..... "He used his tongue on my private part". Thereafter, the accused had given her \$2.00 and told her not to tell anyone about what happened.*
- (xviii) The complainant testified to another incident where the accused had told her to go with him to the dalo farm. "I went with him and he did the same thing to me. He touched me. .... After that he touched my breasts. Then he licked my private part. Then he put his hand in my vagina".*
- (xix) The complainant said that thereafter she came and stayed at Sai's house. When asked what happened when she came to Sai's house, the witness said: "I went to Sai's house. They were all having tea. I went inside and I was sitting with them. Then grandfather (Vereti) came by the house and told me to go straight home and not to roam around".*
- (xx) At this point Sai had asked her if her grandfather was doing something to her and she had replied yes. She had told Sai that her grandfather had been harassing her and touching her. Thereafter Sai's mother had called her and Sai had informed her mother about what the complainant had told her. Thereafter Sai's mother had reported the matter to the Police.*
- (xxi) Since the complainant herself had on one occasion during her testimony used the word vagina, she was asked to explain further about the word. The witness said, it is where babies come out from. The witness confirmed that by private part, mimi and vagina she meant the same thing.*
- (xxii) The complainant identified the accused in the dock as her grandfather Vereti.*
- (xxiii) The witness said that at the time the incident inside the toilet was taking place, she did not yell or shout or do anything else. She did not provide a specific answer as to the reason she did not do so. She said when the accused was doing*

*these acts to her in the toilet, she did try to get away from him. She had told him to move so that she can go outside. However, the witness testified that this was after the accused had committed the acts on her. The witness said that when she saw her grandfather inside the toilet she had felt scared.*

- (xxiv) The complainant was cross examined at length by the defence.*
- (xxv) She agreed that at Church Road, she was staying at the Gold Miners Quarters. She agreed that the house she was staying in was situated on a hill and you have to go down the steps to get to her quarters. She further agreed that as you come down the steps you will first go past the 1<sup>st</sup> Quarters and that she was staying in the middle quarters (2<sup>nd</sup> Quarters). Behind the quarters she was staying in there was also another quarters (3<sup>rd</sup> Quarters).*
- (xxvi) The complainant confirmed that in the front of her house there is a small porch which could fit around three people. Right beside the small porch is a small deck where the water tank is placed. There is also a porch at the back of the house that leads from the kitchen. From that porch you can clearly see the 3<sup>rd</sup> Quarters. From the porch at the back, there are steps that lead to the ground and to the 3<sup>rd</sup> Quarters. The distance from the middle quarters to the 3<sup>rd</sup> Quarters was about 4 to 5 metres.*
- (xxvii) The witness agreed that the vacant house that she referred to in her testimony is the 3<sup>rd</sup> Quarters. That vacant house had been recently torn down/demolished.*
- (xxviii) The witness confirmed that to get from her quarters to Tai Vereti's barracks you will have to first climb up the steps, when you reached the top of the steps there is a road, from the road you have to go to the right, then a few metres in front you will have to turn right again. The distance from her place to the accused place is about 200 metres. [It is an agreed fact that the complainant and the accused's residence is in close proximity (walking distance)].*
- (xxix) The complainant further agreed that the distance between Tai Vereti's barrack and the recent complainant, Sainimili's barracks was about 3 metres. The accused stays on the left side and Sainimili stays on the right side. She confirmed that she usually goes to Sai's place to play. The barracks where the accused and Sainimili stay they have water only for washing but not for drinking (they have no water tanks). Therefore, the accused usually comes to her place to fetch water and that her father has given the accused permission to fetch water from their tank.*
- (xxx) It was suggested to the witness that during the time of the alleged incidents that she testified to at no time was her mouth closed or her hands or legs tied or that she was in any manner restrained. As such it was suggested to her that she could have screamed or shouted, she could have pushed or kicked the accused or she could have run away from him. It was suggested that the reason she did not do any of these was due to the fact that the allegations made against the accused is not true. The complainant said the*

*allegations were true. It was further suggested that the allegations only came to light because Sainimili had influenced her to make up these allegations. The complainant denied this suggestion and stated that Sainimili had asked her (whether the accused had done anything to her).*

- (xxxii) The complainant agreed that on the particular day she had informed Sainimili of the alleged incident that she was playing at Sainimili's at the time and that her grandfather Vereti had just returned back from her house. She also agreed that her mother had told the accused to ask the complainant to return back home if he saw her at Sainimili's.*
- (xxxiii) The complainant was questioned about the statement made by her at the Tavua Police Station on the 9 January 2021.*
- (xxxiiii) The Defence highlighted the following omission in the testimony given in Court by the witness vis a vis her statement made to the Police on 9 January 2021:*

*Although in her testimony in Court the witness stated that the accused had told her to go with him to the dalo farm she had made no mention of this fact in her statement made to the police.*

**[34] Evidence of Sainimili Kidimoce**

- (i) The witness testified that she is residing at Church Road, Vatukoula with her husband, her brother, his wife and their children. She has been residing at Church Road, Vatukoula since birth.*
- (ii) The witness said that she knows the complainant KLLL since they moved to Church Road. KLLL is also known as L. Her husband is related to the complainant's father. They are more like cousin brothers. The complainant calls her aunt.*
- (iii) The complainant usually comes to her house to play with her brother's kids. The distance between her house and the complainant's house is approximately 150 to 200 metres.*
- (iv) The witness said that the complainant was usually a quiet person. However, with the children they behave like siblings. They eat together and do things together.*
- (v) The witness testified to the events which took place on 7 January 2021. On that particular day the witness said that she was at home with her husband, her brother and his wife. They were sitting on the porch having tea. Later the witness said they were having breakfast.*
- (vi) Around 10.00 a.m. the complainant came running into the house. She looked frightened and confused. She had sat down at the porch. The witness had looked at her and asked what happened. At that time the accused Vereti came and was growling at the complainant asking her not to be inside the witness's house but to go back to her house. She refers to the accused as her big uncle.*



- (vii) *The witness had asked the complainant why Vereti was angry with her. Then the complainant had said that she is afraid of him. The witness had asked her why she was afraid of him and she said that Vereti did something to her at the rourou farm.*
- (viii) *When asked what exactly the complainant had told her, the witness said: "He touched her breasts, he touched her private part and had carnal knowledge with her at the dalo leaves farm. She also said that he had been doing that for a long time at their house. That he took her to the toilet, the washroom. He used his tongue – and all things I have mentioned".*
- (ix) *When asked what the complainant's reaction was at the time, the witness said that she looked frightened and scared. She was afraid of the accused because he had told her not to tell anybody about what happened.*
- (x) *The witness testified that soon after hearing what the complainant said, she had gone outside and confronted the accused and told him that the complainant had spoken and told them what he has been doing to her. The accused had said that the child was lying.*
- (xi) *While she was confronting the accused her mother was on the phone with her sister in law. Her sister in law gave the witness the phone so that she can speak to her mother. Her mother had told her to take the phone to the complainant's mother. The witness had taken the phone to the complainant's mother. Her mother had told the complainant's mother to report the matter to the Police. However, the complainant's mother had said, she can't report the matter since they are related and are close.*
- (xii) *Therefore, the witness said that it was her mother who reported the matter to the Police. The Police had arrived thereafter.*
- (xiii) *The witness identified the accused in the dock as Vereti Tikodramai.*
- (xiv) *The witness was cross-examined at length by Counsel for the Defence.*
- (xv) *It was suggested to the witness that in the past that there had been a disagreement between her and the accused in the same barrack at Church Road. The witness agreed to the suggestion. However, the witness denied that ever since that disagreement that she had not been seeing eye to eye with the accused on certain issues or that she disliked the accused.*
- (xvi) *The witness said: ".....That issue happened long time ago. We have gone past it. We have forgiven each other and moved on".*
- (xvii) *It was suggested to the witness that the accused never growled at the complainant for being in her house (on 7 January 2021) and that he only passed by and asked her what she was doing there. The witness said that the accused had growled at the complainant.*
- (xviii) *It was further suggested to the witness that the complainant did not say anything about the accused to her, and that it was the witness who had influenced the complainant and put things in her mouth. The witness categorically denied this suggestion.*

- (xix) *In cross-examination the witness was referred to the statements made by her to the police on 9 January 2021 and 12 December 2021.*
- (xx) *The Defence highlighted the following inconsistency in the testimony given in Court by the witness vis a vis her statement made to the Police on 9 January 2021:*

*In her testimony in Court, the witness said that around 10.00 a.m. the complainant came running into the house. She looked frightened and confused.*

*However, in her statement made to the Police, it is recorded as follows: "At around 1.00 to 2.00 p.m. this girl L told me that she is afraid of Vereti our neighbour".*

- (xxi) *In re-examination the witness confirmed that she did not make up the allegations against the accused. She is stating what the complainant had informed her.*

[35] At the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that the accused had committed the offence he is charged with in Count 5. Accordingly, the accused was found not guilty and acquitted of the said charge. The reasons for this decision will be further elaborated upon later in this judgment.

[36] However, this Court decided to call for the defence in respect of Counts 1, 2, 3 and 4. 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.

[37] The accused exercised his right to remain silent.

### Analysis

[38] As stated before, the prosecution, in support of their case, called the complainant (KLLL), and a neighbour of the complainant, Sainimili Kidomoce, who is the recent complaint witness. The prosecution also tendered the Birth Certificate of the complainant as Prosecution Exhibit PE1.

[39] The accused exercised his right to remain silent.

- [40] As I have stated earlier, the burden of proving each ingredient of every charge 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 the elements of all the charges beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove in paragraphs 7, 8, 18, 19 and 20 of this judgment.
- [41] I have summarized the evidence of the two witnesses led during the trial.
- [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] During the course of the testimony of the complainant some evidence relating to uncharged acts was also elicited by the prosecution, specifically in relation to certain acts which allegedly took place at a vacant house and at the dalo farm. This Court permitted this evidence to be led at the time, since the prosecution was attempting to elicit evidence of the complainant in relation to Count 5.
- [44] However, in spite of the numerous probing questions put to the complainant, she did not come out with any evidence in relation to Count 5. In the circumstances, at the end of the prosecution case, this Court decided that there was no relevant or admissible evidence to establish that the accused had committed the offence he is charged with in Counts 5. Accordingly, the accused was found not guilty and acquitted of the said charge. However, this Court decided to call for the defence in respect of Counts 1, 2, 3 and 4.
- [45] It must be emphasized that this Court will disregard all evidence led in respect of the uncharged acts and give no weight to the said evidence.
- [46] The accused totally denies all the allegations made against him. The defence position is that during the time of the alleged incidents at no time was the complainant's mouth closed or her hands or legs tied or that she was in any manner restrained. As such it was suggested to her that she could have screamed or shouted, she could have pushed or kicked the accused or she could have run away from him. It was suggested that the reason she did not do any of these was due to the fact that the allegations made against the accused is not true. It was further suggested that the allegations only came to light

because Sainimili had influenced the complainant to make up these allegations. The complainant categorically denied these suggestions.

[47] It must be borne in mind that as stipulated in Section 206 of the Crimes Act 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. It must also be emphasized that at the time of the alleged incidents the complainant had just reached the age of 13 years, while the accused was 74 years of age at the time.

[48] For these reasons, in my opinion, the defence version cannot be accepted as truthful and reliable.

[49] I have considered the prosecution evidence in relation to Counts 1 to 4. The complainant testified at length to the manner in which the accused had touched her breasts on top of her clothes, first in her bedroom and on another occasion in the bathroom. Furthermore, the complainant has clearly testified to the manner in which the accused had inserted his tongue in her vagina and also inserted his finger in her vagina, without her consent, while in the toilet.

[50] Although only 15 years of age at the time of her testimony, the complainant withstood the rigorous cross examination by the defence and remained consistent throughout her evidence. It is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable.

[51] On 7 January 2021, she had complained to her aunt Sainimili Kidomoce about what the accused had done to her. This clearly qualifies as a recent complaint. It is trite law with regard to recent complaint evidence that the complainant need not specifically disclose all of the ingredients of the offences and describe every detail of the incidents, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. I am satisfied that the complainant made a proper complaint in this case. Accordingly, I consider that her credibility is strengthened in view of that recent complaint.

[52] I must emphasize that I have borne in mind that the recent complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of

the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[53] 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.

[54] I agree that the complainant only reported the matter to her aunt Sainimili Kidomoce, on 7 January 2021 and only thereafter was the matter reported to the Police.

[55] 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.

[56] The complainant has clearly testified to the reasons for not reporting the matter to any family member or to the Police earlier. The witness testified that she did not tell anyone at home about what had happened because the accused had told her not to inform anyone about the incidents. I am satisfied with the complainant's explanation for the delay in reporting the matter.

[57] The defence also attempted to impeach the complainant's credibility by highlighting one omission in her statement made to the Police on 9 January 2021, in comparison to the testimony given by her in Court. Similarly, the defence attempted to impeach the credibility of witness Sainimili Kidomoce by highlighting one contradiction in her statement made to the Police on 9 January 2021, in comparison to the testimony given by her in Court. I have identified and made reference to the said omission and inconsistency when summarizing the complainant's and Sainimili Kidomoce's evidence.

[58] 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.

[59] The omission relates to the complainant testifying that the accused had told her to go with him to the dalo farm, but she had made no mention of this fact in her statement made to the police. All reference to the alleged incident at the dalo farm constitute

uncharged acts. As stated earlier, this Court will disregard all evidence led in respect of the said uncharged acts and give no weight to the said evidence.

[60] As to the contradiction in relation to witness Sainimili Kidomoce's evidence. In her testimony in Court she reiterated that the complainant had come running to her house, at around 10.00 a.m., on 7 January 2021. Thereafter, the complainant had informed the witness of what the accused had done to her. In her statement to the police it is recorded as follows: "At around 1.00 to 2.00 p.m. this girl L told me that she is afraid of Vereti our neighbour". However, in my opinion this inconsistency is not material.

[61] As such, I am of the opinion that the reliability and credibility of the complainants' evidence and Sainimili Kidomoce's evidence remains unaffected.

[62] Having analysed all the evidence in its totality, 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 Indecent Assault with which the accused is charged in Counts 1 and 2; and the charges of Rape with which the accused is charged in Counts 3 and 4.

[63] In the circumstances, I find the accused guilty of the charges of Indecent Assault and Rape with which he is charged in Counts 1 to 4.

[64] Accordingly, I convict the accused of the charges of Indecent Assault and Rape, with which he is charged in Counts 1 to 4.



AT LAUTOKA

  
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Dated this 22<sup>nd</sup> Day of February 2023

**Solicitors for the State** : **Office of the Director of Public Prosecutions, Lautoka.**  
**Solicitors for the Accused** : **Office of the Legal Aid Commission, Lautoka.**