

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 61 of 2021

STATE

V

ILAISA DAU

Counsel : Ms. Saini Naibe for the State
Ms. Losana Taukei with Ms. Priyanka for the Accused

Dates of Trial : 29 & 30 November and 4 December 2023

Closing Submissions : 6 December 2023

Judgment : 12 February 2024

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

JUDGMENT

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

ONE COUNT

Statement of Offence

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

Particulars of Offence

ILAISA DAU, on the 15th day of May 2021, at Mataveikai Village, Rakiraki, in the Western Division penetrated the vagina of **AV**, a child under the age of 13 years, with his finger.

- [2] The accused pleaded not guilty to the charge 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 one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act.

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

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

- [7] 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.

- [8] 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 for penetrating the vagina of the complainant with his finger.
- [9] Therefore, in order to prove the first count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this instance the 15 May 2021);
 - (iii) At Mataveikai Village, Rakiraki, in the Western Division;
 - (iv) Penetrated the vagina of the complainant AV, with his finger;
 - (v) At the time the complainant AV was a child under the age of 13 years.
- [10] To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offence.
- [11] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [12] The fourth element involves the penetration of the complainant's vagina, with the accused's finger. 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 finger to any extent.
- [13] The final element is that at the time of the incident the complainant was a child under 13 years of age. The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As would be seen later in this judgment, the complainant in this case was only

8 years and 8 months old at the time of the alleged incident of Rape, and therefore, she had no mental capacity to give consent. [Her date of birth being 17 September 2012].

[14] 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 is obviously considered as an offence 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

[15] 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.

[16] Accordingly, the prosecution and the defence have consented to treat the following facts as "Admitted Facts":

1. THAT AV (hereinafter referred to as the "Complainant") at the material time was 9 years old, Student of Mataveikai Village.
2. THAT the Complainant was born on the 17th of September 2012.
3. THAT Ilaisa Dau at the material time was 76 years old, Farmer of Mataveikai Village, Rakiraki.
4. THAT he is the complainant's great grandfather.
5. THAT the Complainant refers to him as "Kawa".

6. THAT on 15th May 2021, the Complainant was at his house with her friend and they were playing with their dolls.

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

Case for the Prosecution

[18] The prosecution, in support of their case, called the complainant (AV), her mother Sereana Ravouvou and Dr. Mere Vakawaletabua.

[19] The prosecution also tendered to Court a Diagram as Prosecution Exhibit **PE1** and the copy of the Medical Examination Report of the complainant as Prosecution Exhibit **PE2**.

[20] Evidence of the complainant AV

- (i) *The complainant’s evidence was recorded over a period of one day. Her evidence was recorded in a ‘closed court’ and a screen was placed so that the complainant could not see the accused.*
- (ii) *Further measures were taken in this case whereby the Judge and all Counsel dispensed with their wigs and gowns at the time the complainant was testifying and where the Judge sat at the Court Officers’ table below to hear the complainant’s testimony.*
- (iii) *At the time of testifying in Court the complainant was 11 years of age. This Court was satisfied that the complainant was competent of taking her oath prior to giving evidence.*
- (iv) *The complainant testified that she is residing at Mataveikai Village, in Rakiraki with her father, mother, grandfather, grandmother and her brothers and sisters. She has three brothers and one sister. Her father’s name is Suliasi Lario and her mother’s name is Sereana Ravouvou.*
- (v) *The complainant confirmed that her date of birth is 17 September 2012. So she is now 11 years of age. Currently she is a Year 5 student at Barotu Primary School in Rakiraki.*
- (vi) *The complainant testified to the events which took place on 15 May 2021. She said it was a Saturday. At the time she said she was 9 years old and was in Year 3 at Barotu Primary School.*
- (vii) *It is an Admitted Fact that on 15 May 2021, the complainant and her friend went to play with their dolls at Ilaisa Dau’s house. It is further admitted that Ilaisa Dau is the complainant’s great grandfather and that she refers to him as “Kawa”.*
- (viii) *The witness said that the name of her friend was Sereana Lau. She was in kindergarten. Thus Sereana Lau was younger than her.*

- (ix) *The complainant testified that before going to Ilaisa Dau's house she was at her place. Her father had sent her to go and get the knife. Lau had then called her. She had told Lau that she was going to her house. But then Lau had told that they take the knife together. After that, the witness went to where Lau was calling from. She was calling from the window of Ilaisa Dau's house.*
- (x) *After going to Ilaisa Dau's house, she was playing dolls with Lau. Apart from the Complainant and Lau, there was no one else in the house other than Ilaisa Dau. He had been lying down on his bed. The complainant and Lau had been playing dolls just beside where his TV is located.*
- (xi) *The complainant said that Ilaisa Dau had come and sat on the chair and put on the TV. He had then told the complainant and Lau to go and lie down on his bed. She had then told Lau that she couldn't go on the bed because it was her Kawa's bed.*
- (xii) *The following questions were then asked from the witness and she answered as follows:*

Q. *Then what happened?*

A. *Then we just went and lie on the bed.*

Q. *What about Ilaisa Dau?*

A. *He was sitting on the chair.*

Q. *What were you doing on the bed with Lau?*

A. *We were just lying down.*

Q. *Then?*

A. *After that Kawa then went up on the bed.*

Q. *Then?*

A. *Then I went down from the bed/I got off from the bed.*

Q. *What happened then?*

A. *When I got off the bed, Kawa also got off the bed.*

Q. *Then?*

A. *When I stood up, Kawa then pulled my hand.*

Q. *Then what happened?*

A. *Then he pulled down my trousers. Then he touched my vagina (yaya vayalewa-in iTaukei).*

Q. *What did he use to touch your vagina?*

A. *He used his hand.*

Q. *Can you show which hand?*
A. *The witness showed the pointer finger of her right hand (index finger).*

Q. *How did you feel at that time?*
A. *When I had my shower, it pained.*

Q. *At the time he touched your vagina – how did you feel at that time?*
A. *I felt pain.*

Q. *When this happened, did Kawa tell you anything?*
A. *Yes. He told me not to tell anyone or else my mother will smack me.*

Q. *Did you tell him anything at the time?*
A. *I told him not to do it.*

Q. *What was his response?*
A. *He just did it.*

Q. *You said Kawa touched your vagina? Can you explain? What do you mean?*
A. *He pulled my trousers and then he poked.*

Q. *What did he poke?*
A. *The place where I normally urinate.*

At this stage a diagram was shown to the complainant (Prosecution Exhibit PE1) and she was asked to mark the place where Kawa had poked. The complainant marked that place on the diagram.

Q. *What happened after that?*
A. *And then my mother came took the stick and banged it on the house wall.*

Q. *Was there windows and doors in Kawa's house?*
A. *It was closed.*

Q. *Do you know who closed the windows and doors?*
A. *Kawa.*

Q. *What happened when you mother came and banged on the house wall?*
A. *Then he opened the door.*

Q. *Which door?*
A. *The main entrance door.*

Q. *Then what happened after that?*
A. *Then my mother told me to go back to our house.*

Q. *Did you tell your mother about what happened at Kawa's place?*
A. *No.*

Q. *Why not?*
A. *Because Kawa told me not to tell (anyone).*

.....

Q. *Did you tell anyone else?*
A. *Yes.*

Q. *Who did you tell?*
A. *I told my Aunty Liti – she is a Police Officer.*

Q. *Who else was there?*
A. *It was just myself and Aunty Liti.*

Q. *What happened after that?*
A. *Then Aunty Liti called my mum.*

Q. *Then what happened?*
A: *Then my mother asked me what Kawa did to me.*

Q. *Then what happened/what did you tell your mother?*
A. *I then told her what Kawa did.*

Q. *What happened after that?*
A. *Then we went to the hospital.*

Q. *Who all went to the hospital with you?*
A. *Myself, Aunty Liti, my mum and another Police Officer.*

(xiii) *The complainant testified that the distance from her house to her Kawa's house was about 10 to 12 metres (very close). She used to normally go to his house when she took his food. She said that her relationship with him was good prior to this incident.*

(xiv) *The complainant said that when her Kawa had poked the place she urinates Lau was playing cards besides the TV.*

(xv) *The witness said that on that particular day, her Kawa was wearing a wrap-around sulu (sarong). He was not wearing anything else. She had been wearing*

long trousers with a tights inside. On top she had been wearing a singlet. The complainant said that when Kawa removed her trousers, he had pulled both the trousers and the tights. He had held on to both the trousers and the tights and pulled them below her knees-up to her calf area (witness demonstrated how this had happened).

- (xvi) The complainant identified the accused in the dock as Ilaisa Dau.*
- (xvii) The witness said that after the accused had poked the place she urinates from (her vagina), she had then worn her clothes and come to where Lau was seated and they watched movies together. This is the stage at which her mother had called her and told her to go back to her house. The witness had then returned to her house.*
- (xviii) The complainant said that at the time her mother sounded angry, since she was inside the accused's house.*
- (xix) When asked as to for how long the accused had poking her vagina, the witness said that he just did it once. She said: "He just poked it just after that he removed his hand".*
- (xx) The complainant was cross examined by the defence and the defence case theory was put to the witness.*
- (xxi) It was suggested to the complainant that it was she and Lau who had closed the doors and windows in the accused's house so that the dolls could sleep. The witness denied this and said that it was the accused who had closed the doors and windows of the house, while they were playing with the dolls.*
- (xxii) It was suggested to the complainant that she, Lau and the accused did not get on the bed that day. The witness said that she and Lau lied down on the bed, but when the accused came to lie on the bed, she came down/got down from the bed. It was further suggested to the complainant that (that day) the accused was always sitting on his chair and watching TV. She denied this suggestion.*
- (xxiii) It was suggested to the complainant that the accused did not remove her trousers and tights. She said he did remove it (them). It was further suggested that the accused did not poke her vagina. The witness said he did it.*
- (xxiv) It was suggested to the complainant that her mum did not like the accused. However, the witness said that her mum and the accused had a good relationship.*
- (xxv) It was also suggested to the witness that the reason she did not tell her mum or anyone else about the incident the same day or at the same time was because the accused never poked her vagina or touched her vagina. The witness said that she didn't tell her mum because the accused had told her not to tell her mum. Although, she didn't tell her mum, she says she told her Aunty Liti.*
- (xxvi) It was suggested to the complainant that she was forced to tell Aunty Liti the story (about the incident) and the reason that she was forced to do so was because she was a Police Officer. The witness denied these suggestions.*

(xxvii) It was finally suggested to the complainant that she was put up to say this story about the accused poking her vagina, but the accused did not poke her vagina. The witness denied this and said the accused did it.

[21] Evidence of Sereana Ravouvou

- (i) The witness testified that she is 34 years of age. She is currently residing at Mataveikai Village. She is doing domestic duties.
- (ii) The witness said that she that she is married to Suliasi Lario. They have 5 children together. The complainant is the second oldest child. She is now 11 years old. Her date of birth is 17 September 2012.
- (iii) The witness testified to the events which took place on 15 May 2021 (which was a Saturday). At the time she was residing at Mataveikai Village. The complainant was 9 years of age at the time.
- (iv) The witness said that in the morning that day, she was at home cooking lunch. Her husband and her 4 children (her youngest child was only born last year-2022) had gone to plant some cassava in their farm. She had been cooking lunch to take to the farm. While she was cooking, one Seruwalu Bati, who is a neighbor of the accused, came to her house and told her to go to the accused's house, since the complainant and a friend were at the accused's house.
- (v) The witness said, she had run to the accused's house. She said the distance between her house and the accused's house is 10 to 12 metres. When she got there she had seen all doors and windows were closed and all curtains were closed as well.
- (vi) She had then started peeping around the house. From the back window, she didn't see anyone. When she came to the door in front, she could see (from a gap at the bottom of the door) the accused standing in front of his TV, while the children were seated beside him on the floor. Then she saw on the TV-a song movie. Then she saw the accused heading towards his bed. She could see that the accused was not lying on his bed but was sitting on his bed. In front of him there was a big white curtain. Then one of the girls – Lau, stood up to bring a toy which was beside the accused's foot. When the accused had kicked the toy to Lau, he had pushed the curtain. Then the witness had seen that the accused had no shirt, no clothes and the sulu vakatoga (sarong) was down.
- (vii) The witness said on seeing this, she had called the accused three times. However, since the music inside the house was loud, no one had heard her call. Therefore, the witness had picked up a stick and smashed it on the house and asked the accused to open the door and for her daughter to come outside. At this stage, the complainant had opened the door and come out to her.
- (viii) The witness explained that at the bottom of the front door of the accused's house there is a gap on one side of the door. The gap was covered with a door mat. She had inserted her hand and pushed the door mat aside. She was able to see inside the house through this gap.

- (ix) *After taking the complainant home she had told one of her cousins to call her husband from the plantation. When her husband came home, she had told him that the complainant was at the accused's house with all the doors and windows locked.*
- (x) *Her husband had told her to ask the complainant what she was doing at the accused's house. When the complainant was asked she had said she was playing around with toys with Sereana Lau. Apart from that the complainant had not said anything else. This was around 11.00 in the morning.*
- (xi) *The witness said she and her husband had asked the accused whether he had done anything to the children. The accused had said he didn't do anything to the 2 children.*
- (xii) *The witness testified that the following Monday the police had come to their house. The Police had come looking for the complainant in relation to rumours that had been received at the Police Station. 2 Police Officers (one male, one female) had come with a driver. The female officer was one Litiana.*
- (xiii) *The complainant had then come and spoken with Litiana in their sitting room. At the time the witness had been in the kitchen. Thereafter, Litiana had asked the witness to come to where they were seated. She had done so. The complainant had told Litiana that her Kawa had touched her (private part). Her Kawa had said for the complainant to put down her trousers for him to touch her private part (she said 'nuga' in i-Taukei).*
- (xiv) *The witness said she knows Police Officer Litiana as she is the Officer who used to come to investigate most of the cases in the village. Litiana's husband is said to be related to her husband.*
- (xv) *On hearing this from the complainant, the witness said she had been angry and requested that her daughter be taken to hospital for examination. Accordingly, the complainant was taken to the hospital by Litiana and the other Police Officer. She had accompanied them.*
- (xvi) *The witness said that prior to the incident, her relationship with the accused was good. Her husband's grandmother was a sister of the accused (Thus the accused is her husband's grand uncle). Her children had always respected the accused as he was their great grandfather. He is also considered as the leader/head of their clan.*
- (xvii) *The accused used to reside with his younger brother Mosese Waqa. She said both the accused and his brother are not married and have no children. They have a sister named Cecilia Waqa, who is staying separately. She cooks for them.*
- (xviii) *The witness identified the accused in the dock as Ilaisa Dau.*
- (xix) *The witness testified that at no point in time had she influenced or forced the complainant to say what she had told Litiana.*
- (xx) *The witness was cross-examined by the defence.*
- (xxi) *The witness agreed that between Saturday and Monday the complainant had not told her or anybody else about what the accused had done to her. Only*

when Police Officer Litiana came to the village on Monday had the complainant come out with the story that the accused had touched her private part.

[22] Evidence of Dr. Mere Vakawaletabua

- (i) *The Doctor testified that she is currently based at the Nadi Hospital. She is serving as the Sub-Divisional Medical Officer for Nadi. She is 38 years of age.*
- (ii) *She had graduated with an MBBS Degree from the Fiji School of Medicine in 2009. Thus, she has been practicing as a Medical Officer for the past 13 years. She had completed her Master's in Public Health in 2017, in Israel.*
- (iii) *The witness testified that as the Sub-Divisional Medical Officer for Nadi she is the overall supervisor for all the Medical Officers and all the Health Facilities that fall under her Sub-Division.*
- (iv) *She has been serving in Nadi only for the past 5 months. Prior to that she had served at the Ra Sub-Division, based at Rakiraki Hospital, for 8 years.*
- (v) *The witness recalled that in 2021 one Doctor Neville Narayan was based at the Waimaro Health Centre in Ra. He used to come to the Rakiraki Hospital on call. She had been in touch with him frequently/on a regular basis. Doctor Neville had started working in Ra in 2019. Unfortunately, the said Doctor Neville had passed away in the year 2022.*
- (vi) *The witness testified that she is familiar with the work of Doctor Neville and his hand writing.*
- (vii) *The witness confirmed that Doctor Neville had conducted the medical examination on the complainant, at the Waimaro Health Centre, on 17 May 2021, commencing at 2.16 p.m. At the time of the examination, the complainant's mother was present. The mother had given her consent to the doctor for conducting of the said medical examination. Doctor Neville had prepared a Medical Examination Report based on his examination of the complainant. The said Medical Examination Report was tendered to Court by the witness as Prosecution Exhibit PE2.*
- (viii) *As to the initial impression of the person to be examined, in column D11 it is recorded that the child was stable.*
- (ix) *The Doctor testified as to the specific medical findings as noted in column D12 of the Medical Examination Report. On vaginal examination and perineum (the area of the body between the anus and the vulva in females): The hymen was not intact (meaning the hymen was broken). There was a bruise on the right side of the labia minora with mild swelling. There is bruise noted under the clitoris.*
- (x) *As per Appendix 2 in Prosecution Exhibit PE2, a bruise has been defined as "An injury in which the skin is intact and blood released from damaged vessels remains under surface."*
- (xi) *The Doctor testified as to the Professional Opinion as depicted in column D14. It is recorded at D14 that the penetration into the vagina was recent as*

claimed by the patient. The witness explained that in medical terms recent could be within 24 hours to 48 hours.

(xii) The witness testified that it was possible for such injuries to be caused by blunt trauma. She said the injuries were consistent with penetration of a finger into the vagina, considering that the patient was only 9 years of age.

[23] At the end of the prosecution case Court decided to call for the defence of the accused. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[24] The accused decided to testify on his own behalf.

[25] Evidence of Ilaisa Dau

- (i) The witness testified that he is 80 years of age and lived his whole life in Mataveikai Village in Ra. As per his bail conditions, he had been residing at Lovu in Lautoka. He had been living in Lovu for about 2 years.*
- (ii) The witness said that in the year 2021 he was living in Mataveikai Village in his own house. He was staying with one of his brothers, Mosese and a sister named Cecilia.*
- (iii) He said his wife had passed away in 2001. He has no children.*
- (iv) His house is a tin house with wooden floors. It has no rooms-it is open space inside the house with a curtain in the middle. There are 3 doors in his house (Including the front door). The house is 30 feet.*
- (v) The witness testified to the events which took place on 15 May 2021. He said it was a Saturday. That morning he was at home watching TV. While watching a movie, 2 children came to his house-the complainant and Sereana (Lau). They had come and asked him whether they could play with the baby dolls. He had informed them to go and play on the other side of the house besides the door.*
- (vi) Then after a while, the two of them had closed all the windows and doors in the house. He had told them not to do so because it was very hot. He said the children had closed all the windows and doors to play with the dolls-they been acting like they were the mother of the dolls (and the dolls were their babies).*
- (vii) The witness said that he had put on his electric fan and continued to watch TV. His TV is located on the other side of the door opposite to where the children were playing initially. There is a table there and the TV was on it. In*

front of the TV there is like a dining chair. He was seated on that chair and watching TV. The children had continued playing with their dolls at the same place where they had started playing at.

- (viii) After a while, he said he had go a shock when he heard someone hitting the wall of his house. He had heard somebody talking, but didn't know who it was. Later he had come to know that it was the complainant's mother Sereana.*
- (ix) At this stage the 2 children had stood up and run towards the door from where Sereana was talking from. They had opened the door and gone outside. Sereana had then taken the children to her house. Sereana had not spoken to him at the time.*
- (x) The witness testified that the children were playing in his house for about 10 minutes, prior to the complainant's mother Sereana calling them.*
- (xi) After a while, Sereana and her husband had come into his house. They had sat and spoken. Sereana's husband had asked him what had happened. He had replied that nothing had happened. Her husband had then said that everything was fine and the conversation will end here. They had then gone back to their house. He had remained at home.*
- (xii) The witness testified that he got a shock, when the following Monday, when the Police vehicle came and took him. He said it was not the parents who called the Police. It was someone else who called and informed. He said he got to know this from the complainant's father.*
- (xiii) The witness said that when the complainant's mother Sereana had called the complainant and Sereana (Lau) were still playing. He was still sitting on the chair and watching TV. He reiterated that at no time did he move from the chair he was watching TV.*
- (xiv) The witness categorically denied the allegations made against him by the complainant.*
- (xv) He testified that while the complainant and Sereana (Lau) were in his house at no time did he undress. He was just wearing the clothes he was wearing from morning.*
- (xvi) The witness was cross-examined at length by the Learned State Counsel and the prosecution version of the events were suggested to him.*

Analysis

[26] As stated before, the prosecution, in support of their case, called the complainant (AV), her mother Sereana Ravouvou and Dr. Mere Vakawaletabua. The accused testified on his own behalf.

[27] In this case, Dr. Neville Narayan is the Medical Officer who had examined and prepared the Medical Examination Report of the complainant, which has been tendered to Court as Prosecution Exhibit PE2. The examination had been conducted at the Waimaro Health

Centre in Ra, on 17 May 2021. However, since Dr. Neville Narayan is said to have passed away in the year 2022, Court permitted the prosecution to lead the evidence of Dr. Mere Vakawaletabua, who was familiar with his hand writing and his work. This was done in terms of Section 133 (5) of the Criminal Procedure Act. The Section provides: “The contents of any report which the prosecution intends to give as evidence under this section and about which notice has been given under sub-section (2), may be referred to and commented upon by any other expert called as a witness in any criminal trial.”

- [28] The burden of proving each ingredient of the 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 all the elements of the charge beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove at paragraph 9 of this judgment.
- [29] Accordingly, the prosecution has to establish beyond reasonable doubt that the accused, on 15 May 2021, at Mataveikai Village, in Rakiraki, penetrated the vagina of the complainant, with his finger, and at the time the complainant was a child under the age of 13 years.
- [30] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as admitted facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.
- [31] Based on the said admitted facts it is admitted that the accused is known to the complainant as he is the complainant’s great grandfather. The complainant refers to him as Kawa. Therefore, the identity of the accused is not in dispute, as he was well known to the complainant. It is also admitted at the time of the alleged offending on 15 May 2021, the complainant was at his house with her friend Lau and they were playing with their dolls. It is further admitted that the complainant was born on 17 September 2012, and at the time of the alleged offending she was just 8 years and 8 months of age. Therefore, it is proved beyond reasonable doubt that the complainant was a child under the age of 13 years.
- [32] Therefore, the primary issue of dispute in this case is the physical act, namely whether the accused penetrated the vagina of the complainant, with his finger.

- [33] I have summarized the evidence of all witnesses led during the trial.
- [34] The complainant has clearly testified as to how the accused had pulled her hand and pulled down both her trousers and the tights and inserted his index finger (pointer finger) into her vagina, on the 15 May 2021 inside of his house. This was on a Saturday morning.
- [35] The complainant's mother, Sereana Ravouvou, was the recent complaint witness. She testified as to what she had observed on the 15 May 2021 from outside of the accused's house. The witness explained that at the bottom of the front door of the accused's house there is a gap on one side of the door. The gap was covered with a door mat. She had inserted her hand and pushed the door mat aside. She was able to see inside the house through this gap.
- [36] She further testified as to how she got to know from the complainant the following Monday as to what the accused had done to her. The complainant had told that her Kawa had touched her (private part). Her Kawa had said for the complainant to put down her trousers for him to touch her private part (she said 'nuga' in i-Taukei). This had been told by the complainant in the presence of Police Officer Litiana.
- [37] The above clearly qualifies as a recent complaint, although it was told by the complainant in the presence of Police Officer Litiana. It is trite law with regard to recent complaint evidence that the complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, 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 his credibility is strengthened in view of that recent complaint.
- [38] 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.
- [39] The Defence attempted to impeach the credibility of the complainant during their cross examination by stating that she did not inform her mother or report the matter to the Police immediately as it happened.

- [40] I agree that the matter was formally reported to the Police only on 17 May 2021 (the following Monday).
- [41] 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.
- [42] The complainant clearly testified as to why she did not inform about the incident to her mother or anyone else on the same day the incident happened. She said she had not informed her mother of what the accused did to her soon after the incident or when she returned home, as the accused had told her not to tell anyone or else her mother will smack her. She had told her mother about the incident the following Monday in the presence of Police Officer Litiana. In these circumstances, I am satisfied with the complainant's explanation for the delay (of 2 days) in reporting the matter to the Police.
- [43] Prosecution witness Dr. Mere Vakawaletabua testified that as per the specific medical findings as noted in column D12 of the Medical Examination Report of the complainant (on a vaginal examination), that her hymen was not intact (meaning the hymen was ruptured); there was a bruise on the right side of the labia minora with mild swelling and there is bruise noted under the clitoris. The Doctor submitted that these injuries which were noted as of recent origin were consistent with penetration of a finger into the vagina of the complainant.
- [44] The accused totally denies the allegation made against him by the complainant. The defence position is that the complainant was influenced or that she was put up to say this story about the accused poking her vagina (although no reference is made in the evidence as to by whom she was so influenced or put up).
- [45] Considering the totality of the evidence in this case, it is my opinion, that the defence version cannot be accepted as truthful and reliable and I reject the defence version.
- [46] Having analysed all the evidence in its totality, it is my considered opinion that the evidence of the complainant and other prosecution witnesses, can be accepted as truthful, credible and reliable. In addition, the complainant withstood the cross

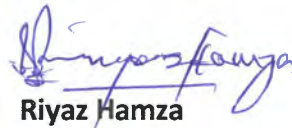
examination by the Defence and remained consistent throughout her evidence, in relation to the material particulars of this case.

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

[48] In the circumstances, I find the accused guilty of the charge of Rape with which he is charged.

[49] Accordingly, I convict the accused of the charge of Rape.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 12th Day of February 2024

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

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