

**IN THE HIGH COURT OF FIJI**

**AT LABASA**

**CRIMINAL JURISDICTION**

**Criminal Case No. HAC 58 of 2024**

**STATE**

**V**

**TAKIRARA TINAU**

**Counsel : Mr. E. Kotoilakeba for the State  
Ms. K. Marama for the Accused**

**Date of Trial : 27 – 28 February 2025**

**Date of Judgment : 20 March 2025**

**JUDGMENT**

1. The complainant has been granted name suppression. I refer to her as ‘C1’ in this Judgment. She was 4 years old at the date of the alleged offending.
2. Mr Takirara Tinau (“the accused”) is charged with a single count of sexual assault, contrary to section 210(1)(a) of the Crimes Act 2009, the particulars being that, on 10 May 2023, at Fatima settlement, Rabi, he unlawfully and indecently assaulted C1 by licking her labia.

**Elements**

3. The prosecution must prove beyond reasonable doubt that:
  - (i) the accused licked C1’s labia; and

- (ii) the assault was unlawful and indecent.
4. An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act, or one that causes the complainant fear or pain. 'Unlawful' means without lawful excuse. The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant's body which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.
  5. The licking of a child's labia by an adult is plainly contrary to the ordinary standards of respectable people in this community. The key issue in the trial therefore is whether I am sure that the accused did in fact lick C1's labia as alleged.

### **The trial**

6. The trial ran for two days from 27 to 28 February 2025.
7. The prosecution called three witnesses, C1, her 14-year-old sister ("C2") and her mother ("CM").
8. The accused elected to give evidence in his own defence, and did not call any witnesses.

### **The prosecution case**

9. C1 gave unsworn evidence from the child-friendly room at the Labasa Court Complex.
10. C1 answered a number of rapport - building questions about her schooling and family. Turning to the alleged incident, she said that while she was playing in the hall Takirara called her. He told her to get his cup, and then

pulled down her pants and started licking her *“thing”*. C1 went on to say: *“He started licking my – inside licking my vagina – of my vagina.”*

11. C1 was shown a diagram of a female child and asked to point to where the accused had licked. She pointed at the genital area. This was marked with a cross, and adduced as prosecution exhibit PE-1.
12. Whilst the accused was doing this, C1’s elder sister pulled her away and they ran home, where they told their mother what Takirara had done to her. When asked what she had told her mother, C1 answered:

*“I told my mother what Takirara did to me, that Takirara asked me to go and bring him his cup, and when I took the cup to him, he pulled down my pants then he started licking my vagina”.*
13. In cross-examination, C1 confirmed that she knows Takirara, and that there is a hall where he lives.
14. When it was suggested to C1 that Takirara had not called her, she replied that he had called her.
15. When it was suggested to C1 that she had gone and sat on Takirara’s lap, she replied that she did not sit on his lap.
16. When it was put to her that Takirara had not pulled down her pants and licked her vagina, C1 said that he took off her pants and licked her vagina.
17. In re-examination, C1 confirmed that she was alone in the hall with Takirara when he did those things.
18. C2 also gave unsworn evidence from the child-friendly room.
19. C2 said that she saw her sister, C1, and Takirara inside the hall. She saw him pull down C1’s pants, and he was licking her vagina. There was nothing blocking her view.

20. When she saw this, she ran and pulled her sister and they ran home. When they got home, they told their mother that Takirara was licking C1's vagina.
21. In cross-examination, C2 said she knew that there was something mentally wrong with Takirara.
22. When it was suggested to C2 that what she actually saw was C1 sitting on Takirara's lap, she replied that C1 was standing.
23. The last witness for the prosecution was CM. She recalled that she was cooking at home on 10 May 2023 when her children came with an issue. She said that both daughters told her that Takirara had pulled down C1's pants and licked her vagina. She called her husband and they reported the matter to the police.
24. At the close of the prosecution case, I ruled that there was a case to answer, and allowed a short adjournment for the accused to take advice on his election. He elected to give evidence in his own defence.

### **Defence Case**

25. The accused testified that it was a false allegation, and he did not do what he was alleged to have done.
26. When asked by Ms. Marama to comment on C1's evidence, he said it was not true. He said that, when he was in the hall, a girl came to sit on his lap, but it was not C1.
27. The accused said that he did not know why a false allegation had been made against him.

### **Closing submissions**

28. In closing, Mr. Kotoilakeba reminded me of the evidence adduced in the prosecution case. He emphasized C2's evidence that she clearly saw the accused licking C1's vagina as she was standing.

29. In her closing speech, Ms. Marama also reminded me of the evidence given at trial. She emphasized that the accused had refuted C1 and C2's account of him having pulled down C1's pants and licked her vagina.

### **Discussions with counsel**

30. After speeches, I raised with counsel whether there were any particular legal directions which they felt that I ought to give myself when I came to consider this Judgment.
31. They did not request any particular directions, but Ms. Mirama agreed that a conventional direction on recent complaint would be appropriate.
32. When I queried whether I could accept what the two girls said to their mother immediately after running home as evidence of truth under the *res gestae* exception, Ms. Marama said that she had no objection to that.

### **Analysis**

33. The prosecution must prove that the accused is guilty. The accused does not have to prove anything to me. The defence does not have to prove that the accused is innocent. The prosecution will only succeed in proving that the accused is guilty if I have been made sure of his guilt. If, after considering all of the evidence, I am not sure that the accused is guilty, my verdict must be not guilty.
34. C1 is a young child. She was 4 years old at the time of the alleged offending, and 6 years old at trial. C2 was aged 12 years at the date of the incident, and 14 years old at trial. It is for me to decide whether they are reliable and have told the truth. The fact that they are young does not mean that their evidence is any more or less reliable than that of an adult. I must assess their evidence in the same fair way as I assess the other evidence in the case.

35. Because the key witnesses are children, I bear in mind a number of things. A child does not have the same degree of maturity, logic, perception or understanding as an adult. A child may find questions difficult to understand – they may not fully understand what they are being asked to describe. It may be that they do not have the words too accurately or precisely to describe things in the same way that an adult might.
36. A child may be tempted to agree with questions asked by an adult because the child sees an adult as being in a position of authority. Also, if a child feels that what they are asked to describe is bad or naughty, this may lead to them being embarrassed and reluctant to say anything about it, or to be afraid that they get into trouble.
37. A child's perception of the passage of time is likely to be very different to that of an adult. A child's memory can fade, even in a short time.
38. These things are relevant to a child's level of understanding rather than to their credibility.
39. None of these things mean that C1 and C2 are or are not reliable: that is a matter for my judgment.
40. At the outset, it is helpful to identify the issues in dispute in this case.
41. It is not disputed that C1, C2, and the accused are well known to each other. Identity is not in issue.
42. The defence says that the allegations against the accused have been concocted. They do not suggest any motive for these falsehoods. I remind myself that I must not conclude that the prosecution witnesses told the truth merely because there is no apparent reason for them to lie. There might be a reason for them to be untruthful that nobody knows about.

43. Essentially, what it boils down to is whether I am sure that the accused licked C1's labia, which, perhaps, could have been more appropriately termed her vulva.
44. This has been a somewhat unusual child sexual abuse case in that there was an eye witness to the abuse. The prosecution case does not rely solely on my assessment of C1's reliability and credibility. Her evidence is supported by C2's evidence.
45. Both C1 and C2 were able to understand the questions being asked of them, and to provide appropriate answers. I have no doubt about their competence to give unsworn evidence.
46. C1's account of the accused calling her, pulling down her pants and licking her vagina was spontaneous and clear.
47. Likewise, C2's account of what she saw inside the hall was coherent and unshaken by cross-examination.
48. Their evidence at trial was consistent with what they told their mother in the immediate aftermath of the shocking incident inside the hall. This supports their credibility, albeit I remind myself that, as a general rule, a recent complaint is not necessarily a truthful complaint, and is not evidence of the facts complained of.
49. In the present case, however, the circumstances in which C1 and C2 stated what the accused had done to C1 lead me to the view that the possibility of concoction can be disregarded. Upon seeing what was clearly a shocking incident, C2 grabbed her little sister, and they ran straight home and immediately informed their mother about the incident. Plainly, they were still emotionally involved in the incident at that time.

50. In these circumstances, the statements made to their mother are evidence of the truth of the facts asserted. They lend further weight to the prosecution case.
51. Turning then to the defence case.
52. I remind myself that if the accused's denials are, or may be, true, I must find him not guilty. Even if I reject the accused's evidence, I must not find him guilty unless the prosecution have made me sure of his guilt.
53. The accused was explicit in his denials, and steadfast under cross-examination.
54. Nevertheless, I did not find him to be a truthful witness. He was not straightforward in his description of another child sitting on his lap, and his demeanour suggested to me that he was grappling with his conscience when the prosecutor suggested to him that he was lying about not sexually assaulting C1.
55. Having rejected the defence case, I must return to the central issue of whether I accept C1 and C2 as truthful and reliable witnesses.
56. As I have already said, they both gave evidence in a straightforward manner commensurate with their age. C1 was able to explain clearly what the accused did to her. Her account was supported by C2's evidence, which was entirely consistent. When challenged about their accounts, both C1 and C2 were firm in rejecting the defence case that what they said happened never happened.
57. I find all the prosecution witnesses to be truthful and reliable. I am sure that the accused pulled down C1's pants and licked her vulva.
58. Mr Tinou, the Court finds you guilty as charged and convicts you accordingly.



59. You have 30 days to appeal to the Court of Appeal.



A handwritten signature in black ink, consisting of stylized initials "WB" followed by a long horizontal line extending to the right.

Hon. Mr. Justice Burney

**At Labasa**

20 March 2025

**Solicitors**

**Office of the Director of Public Prosecutions for the State  
Office of the Legal Aid Commission for the Accused**