

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 20 of 2024

STATE

-v-

JALE PATRICK O'BRIEN

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

Date of Trial: **6 - 7 January 2025**
Date of Judgment: **31 January 2025**

JUDGMENT

1. The complainant has been granted name suppression. I refer to her as “the complainant” in this Judgment.
2. Mr Jale O’Brien (“the accused”) is charged with the following seven counts:

INFORMATION BY THE
DIRECTOR OF PUBLIC PROSECUTIONS

JALE PATRICK O'BRIEN is charged with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

JALE PATRICK O'BRIEN on the 16th of January, 2024 at Vatudamu settlement, Savusavu in the Northern Division, unlawfully and indecently assaulted one [complainant] by kissing her on the lips.

COUNT TWO

Statement of Offence

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

Particulars of Offence

JALE PATRICK O'BRIEN on the 16th of January, 2024 at Vatudamu settlement, Savusavu in the Northern Division, unlawfully and indecently assaulted one [complainant] by squeezing her naked breasts.

COUNT THREE

Statement of Offence

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

Particulars of Offence

JALE PATRICK O'BRIEN on the 16th of January, 2024 at Vatudamu settlement, Savusavu in the Northern Division, unlawfully and indecently assaulted one [complainant] by sucking her breasts.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

JALE PATRICK O'BRIEN on the 19th of January, 2024 at Vatudamu settlement, Savusavu in the Northern Division, unlawfully and indecently assaulted one [complainant] by squeezing her naked breasts.

COUNT FIVE

Statement of Offence

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

Particulars of Offence

JALE PATRICK O'BRIEN on the 19th of January, 2024 at Vatudamu settlement, Savusavu in the Northern Division, inserted his fingers into the vagina of [complainant] without her consent.

COUNT SIX

Statement of Offence

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

Particulars of Offence

JALE PATRICK O'BRIEN on the 19th of January, 2024 at Vatudamu settlement, Savusavu in the Northern Division, unlawfully and indecently assaulted one [complainant] by sucking her vulva.

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

JALE PATRICK O'BRIEN on the 19th of January, 2024 at Vatudamu settlement, Savusavu in the Northern Division, inserted his penis into the vagina of [complainant] without her consent.

Elements

Count One – Indecent Assault

3. To establish count one the prosecution must prove beyond reasonable doubt that:
 - (i) The accused kissed the complainant on her lips; and
 - (ii) The assault was unlawful and indecent.

Counts Two and Four – Sexual Assault

4. To establish the offence of sexual assault, the prosecution must prove beyond reasonable doubt that:
 - (i) The accused squeezed the complainant's naked breasts; and
 - (ii) The assault was unlawful and indecent.

Count Three – Sexual Assault

5. To establish the offence of sexual assault, the prosecution must prove beyond reasonable doubt that:
 - (i) The accused sucked the complainant's breasts; and
 - (ii) The assault was unlawful and indecent.

Count Six – Sexual Assault

6. To establish the offence of sexual assault, the prosecution must prove beyond reasonable doubt that:
 - (i) The accused sucked the complainant's vulva; and
 - (ii) The assault was unlawful and indecent.

7. 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.

Count Five - Rape

8. To establish the offence of rape, the prosecution must prove beyond reasonable doubt:
- (i) That the accused penetrated the complainant's vagina with his finger.
 - (ii) That the complainant did not consent to that penetration.
 - (iii) That the accused knew that the complainant did not consent to that penetration.

Count Seven - Rape

9. To establish the offence of rape, the prosecution must prove beyond reasonable doubt:
- (i) That the accused penetrated the complainant's vagina with his penis.
 - (ii) That the complainant did not consent to that penetration.
 - (iii) That the accused knew that the complainant did not consent to that penetration.

Date of Offence

10. In light of the way the evidence emerged, it is convenient to address at this juncture the materiality of the averment as to date in the counts under consideration.
11. Section 182(3) Criminal Procedure Act 2009 provides that:

“(3) Variance between the charge and the evidence produced in support of it with respect to –

(a) the date or time at which the alleged offence was committed;

(b) ...

is not material and the charge need not be amended for such variation.”

12. In *R. v. Dossi*, 13 Cr.App.R 158, CCA it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted notwithstanding the tribunal of fact finds that the offence was committed on a date other than that specified in the indictment.
13. In my view, in the context of this trial, the dates specified in the Information are not an essential part of the alleged offences.
14. The case has been run on the basis that the alleged offending happened in the afternoon of 16 January 2024, and on the night of 18/19 January, 2024. The accused advanced his alibi on that basis. Plainly, he has not been prejudiced in the conduct of his defence.

The trial

15. The trial ran for two days, from 6 to 7 January, 2025.
16. The prosecution called two witnesses, the complainant and Dr Kesaia Tuidraki.
17. The accused elected to give evidence, and called one witness in support of his alibi, Mr Frankie Lanyon.

The prosecution case

18. In January, 2024, the complainant was living with her father, her biological mother, a nephew, and a cousin at Vatudamu settlement, Savusavu. Her father is the accused. He is not her biological father, but raised her as his daughter from birth.
19. The family dynamic was a little complex. Up to the age of ten, the complainant lived at Vatudamu with the accused and his wife, Emily. In 2021, the complainant and Emily, to whom the complainant was very close, went to live with Emily’s

daughter in Suva. When they heard word that the accused had taken up with another woman, Emily and the complainant moved back to Vatudamu in 2022. The accused moved out of the family home, and went to live on Rabi Island with his *de-facto* wife. Sadly, Emily passed away in 2023. The accused attended her funeral, and stayed a couple of months in the family home before returning to Rabi.

20. In January 2024, the accused returned to Vatudamu to make preparations for the funeral of his cousin, who had passed away in Suva. These preparations lasted two weeks, and it was during this period that the alleged offending occurred.
21. When asked about what happened on 16 January, 2024, the complainant answered as follows:

“Yes, Your Worship. I was at home getting ready to go and play. I was with my father Jale, he called me inside the bedroom. Inside the room he told me to sit on the bed. I didn’t want to, and he told me to sit down. He told me that he want to teach me all the things before I have a boyfriend, all the things that happen when I’ll have a boyfriend, Your Worship.

He want to teach me how to kiss, and I didn’t want to, and then he kiss me. He told me to lie down on the bed, I didn’t want to and he pushed me, made me lie down, and he put his hand in my t-shirt and squeeze my breast, Your Worship. When he want to lift my t-shirt up, I did not want to and he just lifted it up with my bra, he suck my breast, both. And I told him that it’s not yet time that the time will come for me to do those things, Your Worship. And then I left to go and play, Your Worship.”

22. When asked where the accused kissed her, the complainant said he kissed her lips. She said this happened around 3pm.
23. When asked how this had made her feel, the complainant answered as follows:

“I was scared. When I went to play I was worried thinking if I go back home – I was worried and I was scared thinking if I go back home he might do something to me, something else to me, Your Worship. Before I went to play he told me that if I open my

mouth I know what will happen, so I couldn't do anything, I went back home."

24. When asked about what happened on 19 January 2024, the complainant said:

"Yes, Your Worship. Before I take us to the 19th, on Thursday night the 18th I was lying down inside the sitting room with my nephew and my tavale, that night when I was sleeping I feel someone came, hug me - he hug me and said that it's nature, Your Worship.

After that he put my dress up, took off my panty when he did that he was really hugging me tight, he already warned me not to do anything or shout and after that his hand he put inside my vagina, Your Worship.

After that he went down on my vagina – he went and then suck my vagina and then after that he came up again he took his penis and put it into my vagina. After that night we slept, but he was – he kept on hugging me tight so that I could go nowhere and then in the morning again on the 19th.

And on the 19th again that morning he did it again to me, he again put his penis in my vagina. When I stood up to go and bath I feel the blood that came out of me with fluid - white slippery liquid, Your Worship. After I bath, I get ready packing my stuff to take my nephew back to Suva, and I knew that I won't return back to Savusavu. When getting ready to go he came again and warned me saying when you go if you open your mouth you look into the kitchen you saw that knife – you see that knife if you open your mouth that knife – you'll get that knife."

25. When asked whether she saw the face of the person hugging her, the complainant answered:

"Yes, Sir I could see him from the light that was coming from our dining room. I could, yeah I could see his face, I could recognise his voice and the word he used I knew it was him because everything he had done to me he always say that it's nature."

26. The complainant stated that she recognised the accused as the person who did those things to her.
27. Those things were done to her between the hours of 10pm and 11pm on 18 January, 2024. The accused inserted his penis into the complainant's vagina again in the morning before she departed for Suva.
28. The complainant had tried to get the accused off her, but he was hugging her really tightly. She didn't scream because she was scared as he had already threatened her.
29. Describing the rape on the morning of 19 January 2024, the complainant said the accused did it on her for about 4 to 5 minutes, then he let her go because she had to get ready to travel to Suva. After the rape, the complainant took her shower, prepared her nephew for the journey to Suva, and left home at 6am to catch the bus to the ferry terminal.
30. Under cross-examination, the complainant agreed that the accused had been strict with her. She also accepted that the accused had raised her well.
31. The complainant readily accepted that the accused had caught her sniffing benzene on a number of occasions during the funeral preparations.
32. However, the complainant rejected the suggestion that she had edited a photograph on the accused's wife's phone with a rude caption, and also rejected that the accused had found indecent messages and pictures on her Facebook account. When it was suggested to her that she had accessed pornography, the complainant responded as follows:

"That's not me, Your Worship, that's him when I always sleep in the night he always come and take photo of me, but when I took hold of his phone the first thing I usually do I go to his gallery and then I always see the photo. One time I went to the recycling bin and then I saw my photo being deleted, him taking photos of me when I'm sleeping in the night, Your Worship."

33. When it was suggested to the complainant that the accused had hit her with the electric cable from the rice cooker, after he found out that she had been accessing pornography, the complainant answered:

“I was not watching the pornography movie, Your Worship, I was going through the phone I saw my photos, and when I want to approach him to ask him and he was angry, but he did not smack me, Your Worship.”

34. The cross-examination concluded as follows:

“It is my client’s instructions [complainant] that he never kissed your lips because he was not at home on the 16th of January 2024?”

Complainant: Ma’am to be clear that it was him. Your Worship, it was him, who else to be there, the devil, it was him, Your Worship.

Ms Marama: And it is also my client’s instructions that he did not suck your breast on the 16th of January 2024 because he was not there, in fact he was with the other relatives preparing for the funeral?

Complainant: After what he did to me then he left. After all the things he did to me, when I went to play then he went to help the relatives.

Ms Marama: And it is also my client’s instructions that he was out fishing on the 18th of January and he was not at home, so he did not insert his fingers into your vagina on the 19th of January nor did he insert his penis into your vagina on that morning of the 19th of January because he was out fishing.

Complainant: What’s the reason of warning me if he did not do that?

Ms Marama: My Lord, I have no further questions.”

35. Dr Kesaia Tuidraki is a national trainer for gender based violence. She examined the complainant on 26th January, 2024, at 12.47pm.

36. Dr Tuidraki was shown the Police Medical Examination Form she had completed, and gave the following unchallenged evidence:

- (i) *“Moving on to Part D (12) is the specific medical findings that I had noted down on this examination of this patient of mine, so the hymen was not intact. The hymen basically is that thin mucosa or thin tissue that covers partly the vaginal organ opening in females. In addition to that there were hymenal remanences. Remnants are basically residual I may use the word residual like leftovers, so the hymenal remnants was seen, there was white mucoid discharge seen as well and on top of this there was an additional heal linear abrasion which I had noted measuring around 1cm x 0.1cm on the posterior fourchette that I could see with my naked eye. This was tender on per patient so meaning when I touched with the cotton bud pain was elicited by the patient and these were the specific medical findings that I found on my client on this particular day.”*
- (ii) *“My Lord, so any female born at birth not all females there are some females that are actually born without a hymen and – so there actually different types of hymens that females can be born with. There’s scribbly form types, micropaphery, there’s anolotype which is the most common type and they set date type of hymen as well. So in this case the hymen remnants that was seen basically tells me that the hymen is not intact whether it was due to a sexual activity or non-sexual activity we can’t really tell at that point in time because a hymen is not a definite indicator that sexual activity has happen. However, if you look at the additional findings that I have the heal linear abrasion that’s present on the posterior fourchette, so if I may just elaborate bit more on the posterior fourchette, this is essentially the posterior fourchette is located just above the perineum, so the perineum is that area between the vaginal opening and anus. So the posterior fourchette lies just above the perineum, so what happens is it’s basically the labia majora and also us females we have two folds. The labia majora the outside and labia minora and then you have the hymen or the vaginal opening which contains the hymen. So the fold – the two folds of labia minora from both sides they merged and they form this thin – this thin tissue that’s call the posterior fourchette. So these posterior fourchette really doesn’t have any physiological function however, it’s there to maintain the structure and protects the vaginal opening. So – but its clinical significance is that it can be injured, it can be torn during child birth or during sexual activity or in cases of trauma in that particular area. So this is where I felt that the finding really spoke a lot on because of that injury that I had seen on that particular area of the vulva.”*

(iii) *“Yes, My Lord. So let me just take us back and try and explain the stages of wound healing. So any abrasion or any trauma to the body whether it’s externally or internally the body tries and fights it off itself before you need extra things like antibiotics and that sort of stock, so what happen here is so the four stages of injuries firstly of all is hemostasis which begins right after an injury, so in that case what happens is the blood vessels they constrict or they narrow so that they can stop the bleeding and you have platelets which are part of the red blood cells they go into this area to try and stop the excess bleeding. And then it forms a small scab, it’s the light scalp away. So ... after the - a hemostasis stage is the inflammatory stage and this occurs around 0 to 3 days. So in the inflammatory stage is where the white cells of the body they migrate to the injured side to try and fight of the infections so as a result there would be redness, there will be warm, there will be a swelling and there will also be tender which is in laymen’s term pain. So that happens within 0 to 3 days and then the third stage is proliferative stage, so this is – this happens between day 3 to 10 days. 3 to 10 days the proliferative stage does to happen, so the body is trying to basically heal itself, so it starts to form tissues and that’s sort of stuff so that it can try and cover up whatever injury that had happen and then the scab becomes a little thicker than what it was initially from the first stage. And then the last is basically remodeling stage where it tries to cover up everything and everything is sets, so depending on the depth and the size of the abrasion some may leave scars and some may not leave scars. So in this report if you look at what I’ve written there was tender to touch with cotton bud, so when I touched the abrasion basically, she elicited pain, she felt pain, she showed the pain by moving and she cannot make some sound, so when I asked her to confirm whether that really was pain and she said that in Fijian she mention ‘e mosi’ so that’s when I knew. So in my head I’m thinking okay, this would have happen between 3 to 10 days and sure enough she had presented within a week of when the assault had taken place.*

So the findings that I have seen with the account of events that the patient was telling me on this particular day they were basically construed or consistent.”

(iv) *Thank you, My Lord. So D (14) in my professional opinion the findings that were noted on D (12) suggested there may have been a history of penetration which is consistent again with the statement that was given by the client on this particular day.”*

37. The Police Medical Examination Report was adduced as prosecution exhibit PE-1.

Defence submission of no case to answer

38. At the close of the prosecution case, the defence made an ill-conceived application, pursuant to section 178 Criminal Procedure Act, that a case was not made out against the accused sufficiently to require him to make a defence.

39. Ms. Marama submitted that the prosecution had failed to produce any evidence to establish the identity of the alleged perpetrator.

40. In reality, identity was not in issue. The accused was very well known to the complainant. Her evidence was that she saw him clearly on 16 January, 2024. She also saw him on the night of 18/19 January, 2024 at close quarters by the dining room light. Supporting her recognition of the accused, the complainant also recognised his voice, and his manner of speaking to her.

41. When the Court asked Ms. Marama whether there was any evidence to support count four, she submitted that there was not.

42. The prosecution properly conceded that there was no evidence that the accused had squeezed the complainant's naked breasts in the early morning of 19th January, 2024.

43. I acceded to the application in respect of count four, and acquitted the accused on that count.

44. I found that there was a case to answer on counts one, two, three, five, six and seven.

45. When he was given his options, the accused indicated that he would give evidence in his own defence, and informed the Court that he would call two alibi witnesses.

Defence Case

46. There were three strands to the defence case. The accused totally denied all the allegations against him, and suggested that the allegations had been fabricated by the accused out of malice borne of his strict discipline. He also advanced an alibi for both 16 January 2024, and 18/19 January, 2024.
47. The accused works in construction, and when he does not have any contracts he does fishing and farming.
48. He was married to his late wife for 24 years.
49. In 2022, he was with his *de-facto* wife at her place in Rabi Island. He was there when his wife passed away.
50. In January, 2024, he was at his home in Vatudamu, preparing for a family funeral. The preparations lasted for two weeks, and involved building a shed, cutting firewood, and night diving preparing for the fish.
51. When asked to comment on the complainant's allegations that he had assaulted her on 16th January, 2024, the accused stated:

"I think she's lying about what she's saying because I didn't say anything to her about kissing her lips, the only thing I said to her because when she was smelling benzene and before she went out I said, [complainant] before you go out you have to give kiss, so because she was – I found her with the premix for those few days. So that's all what I told her from that day."

52. The accused further elaborated as follows:

"Yes, My Lord, on the 16th I think it was not on that day since I found out when she was going on with the glue and the benzene then I started to give her the warning and I asked her why she was doing that, she said that she missed the mother. So I was trying to stop her from that day, so I told her [complainant] before you go and play or she always go on Facebook every day to just three steps from home there's my brother's door house is there, just form here to that corner there is another house there and this corner, so she always go and Facebook there, so before she goes out – if I'm home I always

tell her [complainant] kiss here, so when she make the kiss then I can smell her breathe whether she's breathing benzene or no because it was like she was doing that every day when she was with me at home, My Lord."

53. When he confronted the complainant about sniffing benzene, she said that she really missed the mum who had just passed away.

54. When asked about when he started to look after the complainant, the accused answered:

"I looked after [complainant] for about 10 years then they left to Suva then I was a parted with my first wife then they left to Suva for 2 to 3 years then she heard that I was with another woman, so she came over again to stay at my house because she was my married wife then I had to move out and let her live there with [complainant] and my other sons."

55. When asked whether he disciplined his children, the accused answered as follows:

"Yes, My Lord. I discipline my children, especially my daughter. I'm really strict to her because when I saw her back from Suva, the life was a bit changed then I know I'm a man because my wife just passed away and she's a girl it's a bit different like adopting staying with the son, so I was bit strict to her during our – maybe 2 months that we lived together since my wife passed away."

56. The accused further elaborated in relation to the complainant as follows:

"[Complainant] I always strict to her because of the phone and also going at night and also going to – there are some of the families always come and ask her to go out for some functions then I don't allow, so I always strict on her in those kind of things like using the phone especially and going out at night, My Lord."

57. When asked about his relationship with the complainant, he said:

"Before my wife passed away our relationship was going well and it was going good and since my wife passed away everything changed when I brought the new woman in my life then I saw that they was not happy or they disagree or don't like

because of some words they were saying not to come at home, and so that's the thing that I found out when my wife passed away, My Lord."

58. When asked to comment on the complainant's evidence about her finding photographs on his wife's phone, the accused stated:

"I can say that she is lying in the court because as she mention before that I had no phone and taking pictures of her and when my wife is there I think it gonna be something very stupid for me to do that because my wife is going over her phone as my wife is working for the Rabi Defensive something like that in the council of Rabi Island, My Lord."

59. When asked about his whereabouts between 10pm to 11pm on 18th January, 2024, the accused replied as follows:

"Well, we were around at the function because the function was during those week the houses was – the people was around there because everything was – everybody has to prepare for what's going to – for the burial and on the 18th we went to – my daughter from Suva called that she wanted some crab. So we went on the road and collected some crabs myself and [complainant] we just walked on the road and collected some crab for her to take it on the next day and when I came back from 'cina' crab then I went diving because we has to prepare for the fish for – I was asked to cater and to prepare fish for the funeral, so we went to dive with the youth members, 5 of us we went together to dive and we came back at early the other morning."

60. When pressed further on timings, the accused said:

"Yes. My Lord, it was around about 10 to 11. It was moonlight so we were waiting for the moon to be dark so we can go and catch fish. Normally we catch fish at dark night, so we left home and we came back around about 5 to 6. We were back at home early that morning."

61. When defence counsel switched back to the allegations about 16 January, 2024, specifically the allegation that he squeezed the complainant's breasts, the accused said:

“All what I can say that I just don’t know why she accused me of squeezing her breast because it was a day time and the people was around so it’s a foolish thing for me to do it because I know the houses – the people was going up and down and from my house just here and the community hall which is burial was happening was just out on this railing outside there, My Lord, that close.”

62. In a similar vein, the accused gave various reasons why none of the allegations could be true. The following answer sufficiently encapsulates the accused’s position:

“All what I can say, My Lord, that it is not true because I know there’s people at home, the biological mother is just in the room and we in the sitting room where we always watch our movie and until it’s daylight and that’s where we just lie and face the screen and – and also my brother’s children always come and lie down and watch movie and also we have this nephew which his name is Joe is around us also at home and he’s just sleeping beside us and or head is just together like this because I have a small sitting room and we sleeping this way and they sleeping this way and our head is just touching each other, so I – what I can say is all what she said is not true, My Lord.”

63. In cross-examination, when pressed on whether he had called the complainant into the room on 16 January, 2024, the accused said he was not sure of the date.
64. Repetitive puttage of the prosecution case elicited an equally repetitive answer of *“That’s not true, Sir”*.
65. The court sought to clarify a number of issues, eliciting the following evidence:

“Judge: And was most of that preparation in and around your house and the settlement, building the shed etc., that was all done close by your house, right?”

Mr O’Brien: Yes, My Lord, it’s just about 10 meters away from home.

Judge: So my next question is, how can you be sure that it was the night of the 18th that you went diving with your family members? How can you be sure it was the night of the 18th?

Mr O'Brien: Because she left on the 19th, and we came back from diving early that morning, and I went to see my elder brother who has a car if he can go and drop them, and also my niece which is she's a nurse at CWM my sister's daughter, and I asked her if he can drop [complainant] in the car, and to pay her ticket in the bus so she can catch the bus goes into Nabouwalu Road.

Judge: So it's your evidence that you arrived home before [complainant] left.

Mr O'Brien: Yes, she left early in that morning. We went on the 18th we came back on the 19th morning, early in the morning.

Judge: Okay. Thank you, any questions following from my questions?

Ms Marama: None, My Lord.

66. Mr Frankie Lanyon was called as the sole alibi witness.
67. Mr Lanyon stated that he was preparing for a family funeral between 14 to 25 January, 2024.
68. When asked what the preparations entailed, Mr Lanyon answered:

"Building of the shed, My Lord, firewood's. On the 18th of January, My Lord, we went diving for fish, My Lord."
69. Mr Lanyon said that there was a crew of five on the fishing expedition, including the accused.
70. When asked about timings, Mr Lanyon said:

"We were prepping for the 18th on the 18th afternoon, My Lord, we were prepping to dive, My Lord. We went to see Jale, Jale was ready, My Lord, because the boat was just beside where Jale and them was staying, My Lord. Before 10, My Lord, Jale came back from collecting - catching crabs, My Lord, and then

we left at 10. About 1 hour travel then we started diving for fish, My Lord, and then we came back at 6 o'clock in the morning.”

71. Under cross-examination, Mr Lanyon stated that the accused was the leader of the crew for the expedition on 18 January, 2024.
72. In re-examination, Mr Lanyon said that he made a statement to the police on 19 January, 2024 confirming the time he went fishing on the night of 18/19 January, 2024.

Closing submissions

73. I heard closing speeches on 7 January, 2025, and I have also read the defence written submissions filed on 7 January, 2025. I have considered everything advanced by both parties.
74. When the Court sought to clarify the defence case, Ms. Marama confirmed that identity was not in issue. In a nutshell, the complainant had fabricated the allegations, and lied in court, because the accused was a strict disciplinarian. The defence also advanced an alibi for both occasions of alleged offending. The accused was engaged in preparation for a funeral all day on 16 January, 2024, and he was night fishing on the night of 18/19 January, 2024.
75. In his closing speech, Mr Kotoilakeba confidently asserted that the prosecution had successfully established all the elements of the counts charged. He also sought to discredit the alibi.

Analysis

76. 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.
77. At the outset, it is helpful to identify the issues in dispute in this case.

78. It is not disputed that the complainant and the accused are well known to each other. Identity is not in issue.
79. The battle lines have been clearly drawn. The defence says that the allegations against the accused have been concocted. They have advanced, explicitly and implicitly, motives for these allegations to have been fabricated. I shall return to these motives below.
80. Essentially, what it boils down to is whether I am sure that the complainant is a truthful and reliable witness whose evidence, considered separately in connection with each count, makes me sure that the accused is guilty as charged. Also, I must be sure that the accused's denials are untrue, and that the prosecution has rebutted his alibi to the criminal standard.
81. It follows that the prosecution case relies solely on my assessment of the complainant's reliability and credibility, albeit the unchallenged medical evidence is capable of providing limited support to the prosecution case in the sense that it supports that the complainant had suffered a recent injury to her genitalia consistent with penetration of her vagina.

Alibi

82. Since I must acquit the accused unless I am sure that he does not have an alibi for the times of the alleged offending on 16 January 2024, and 18/19 January, 2024, it is convenient to deal with the alibi first.
83. An alibi is evidence tending to show that by reason of the presence of an accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.
84. The accused's Notice of Alibi was filed on his behalf on 11 October, 2024. It states that the named three witnesses will confirm that the accused was:
- (i) With them on 16/01/2024 the whole day collecting firewood and bamboo.
 - (ii) With them on 18/01/2024 fishing at Naweni reef, Savusavu from 11pm to 6am.

85. As I have already said, the defence does not have to prove an alibi. The prosecution must prove that it does not arise. I must acquit if either I accept the evidence which would constitute a defence, or short of accepting it, the evidence leaves me in some doubt as to the accused's guilt.
86. With this in mind, I am sure that the accused does not have an alibi for the alleged offending on 16 January, 2024. On his own evidence, preparations for the funeral were taking place close to his home. He was present in the very area that the alleged offending took place. It is wholly unrealistic to suggest that he did not return to his home at any time that day. Indeed, the accused stated that he had spoken to the complainant inside the house during the funeral preparations.
87. Turning to the fishing expedition. Plainly, the accused would have an alibi if he was, or may have been, at sea at the time of the alleged offending on the night of 18/19 January, 2024.
88. It will be recalled that the complainant's evidence is that she was raped and sexually assaulted between 10pm to 11pm on 18 January 2024, and again in the early morning of 19 January, 2024, before she departed for Suva.
89. The accused's evidence is that he was back home from fishing *before* the complainant left for Suva on the morning of 19 January, 2024. Plainly, he has no alibi for the alleged offending reflected in count seven.
90. There is a conflict of evidence as to what time the crew set off on their expedition on the night of 18 January, 2024. The Alibi Notice indicates that they departed at 11pm. Mr Lanyon testified that they departed at 10pm. The accused said they left around about 10pm to 11pm. It was moonlight, and they were waiting for the moon to be dark so they could go and catch fish. He said that they normally catch fish at dark night.
91. I cannot be sure that the accused and his crew did not go fishing on the night of 18/19 January, 2024. I find that they probably did. However, I am sure that they did not embark on their expedition until at least 11pm. The accused was the

leader of the crew, and captain of the boat. I prefer his recollection as to what time the boat set off.

92. It follows that I am sure that alibi does not arise.
93. Since I have not concluded that the accused has made up a *false* alibi to bolster his defence, it is not appropriate to give myself the conventional warning.


Determination

94. The complainant was nearly 15 years old when she gave evidence at trial. I was impressed by her fortitude in speaking about such deeply personal and upsetting incidents in a mature, calm and measured way. Her descriptions of what the accused did to her were unembellished and plausible.
95. I remind myself that there is no burden on the defence to prove that the complainant had a motive to lie.
96. I reject the defence case that the complainant made up false allegations, and lied in court, motivated by resentment of his strict discipline. The complainant said that she had not seen the accused since she left on the morning of 19 January, 2024. She is now living with her uncle in Suva. The accused had been involved in her upbringing only intermittently since she went to Suva with her mother aged ten. In short, the complainant had no reason to make up false allegations to get away from the accused's strict discipline.
97. After carefully considering all the evidence, I find the complainant to be a truthful and reliable witness. I have no hesitation in accepting her testimony about what the accused did to her on the afternoon of 16 January, 2024.
98. I accept the complainant's evidence that the accused digitally penetrated her vagina, sucked her vagina, and penetrated her vagina with his penis between the hours of 10pm and 11pm on 18 January, 2024.
99. I also accept her evidence that the accused penetrated her vagina with his penis before she got up to prepare for her journey to Suva on the morning of 19 January, 2024.

100. The complainant's evidence that when she left that morning she knew that she would not return to Savusavu has the ring of truth about it, and chimes with my impression of her as a determined young woman, with a strong sense of right and wrong.
101. The accused gave evidence confidently, and was steadfast in his denial of any sexual offending against the complainant. However, at times, he strayed into making weak submission points, rather than sticking to the facts of his story. So, for example, when asked by his own counsel about the allegations on 16 January, 2024, he suggested that it would have been a "*foolish thing*" for him to have done because there were many people around at the time.
102. I am not impressed by this evidence. The complainant's unshaken evidence was that the offending on 16 January, 2024 took place in the privacy of the bedroom, the accused having called her in. His suggestion that the presence of others would have made his offending unlikely does not stand up to scrutiny.
103. The accused made a similar point in relation to the alleged offending in the sitting room on 18 and 19 January, 2024. Again, the presence of the complainant's tavale and nephew in the room does not cause me to doubt the truth of what the complainant said the accused did to her. Her evidence was that the child was sleeping, and there is no evidence to assist me in deciding whether her tavale was also sleeping. It could well be that he simply turned a blind eye to what was going on. In any event, it was the complainant's evidence that her tavale was not present in the room when the accused raped her before she showered and prepared for the journey to Suva.
104. Despite his general confidence, I also found the accused to be non-committal, and somewhat evasive, about when certain things happened. It was obvious to me that he was choosing his words carefully to avoid incriminating himself.
105. I do not find the accused to be a truthful witness, and I do not hesitate in rejecting his total denial of any sexual offending against the complainant.

106. It follows from what I have said above that I am sure that the accused is guilty of the offending alleged in counts one, two, three, five, six and seven. I am sure that the offending particularised in counts five and six was perpetrated by the accused between 10pm and 11pm on 18 January, 2024.
107. Mr O'Brien, I find you guilty as charged and convict you accordingly.
108. You have 30 days to appeal to the Court of Appeal.




.....
Hon. Mr. Justice Burney

At Labasa

31 January, 2025

Solicitors

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