

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

Criminal Case No. HAC 107 of 2024

BETWEEN : STATE

AND : PETUELI VARAMASI TEROTUME

Counsel : Ms U Ratukalou & Ms K Dugan for the State
Mr J Cakau for the Accused

Hearing : 1 & 2 April 2025

Closing Submissions : 24 April 2025

Judgment : 6 June 2025

JUDGMENT

[1] The complainant has been granted name suppression. Any public record of these proceedings must not contain any information that may lead to the identity of the complainant. She is referred to as ‘LR’ in this judgment. I have deliberately avoided identifying details that may lead to identifying the complainant.

[2] The accused is charged with nine counts of sexual assault and rape. They are:

Count 1

Statement of Offence

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

Particulars of Offence

PETUELI VARAMASI TEROTUME on an unknown date between the 1st day of January 2021 and the 31st day of December 2021 at Nadera, Suva in the Central Division, unlawfully and indecently assaulted **LR** by rubbing her vagina with his hand.

Count 2

Statement of Offence

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

Particulars of Offence

PETUELI VARAMASI TEROTUME on another occasion other than count 1 between the 1st day of January 2021 and the 31st day of December 2021 at Nadera, Suva in the Central Division, unlawfully and indecently assaulted **LR** by touching her breasts with his hands.

Count 3

Statement of Offence

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

Particulars of Offence

PETUELI VARAMASI TEROTUME on the same occasion as count 2 at Nadera, Suva in the Central Division, penetrated the vagina of **LR**, a child under the age of 13years, with his penis.

Count 4

Statement of Offence

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

Particulars of Offence

PETUELI VARAMASI TEROTUME on the 20th day of March 2024 at Nadera, Suva in the Central Division, unlawfully and indecently assaulted **LR** by procuring **LR** to suck his penis.

Count 5

Statement of Offence

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

Particulars of Offence

PETUELI VARAMASI TEROTUME on the same occasion as count 4 at Nadera, Suva in the Central Division, penetrated the vagina of **LR**, a child under the age of 13years, with his penis.

Count 6

Statement of Offence

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

Particulars of Offence

PETUELI VARAMASI TEROTUME on the same occasion as count 4 and 5 at Nadera, Suva in the Central Division, unlawfully and indecently assaulted **LR** by sucking her breasts with his mouth.

Count 7

Statement of Offence

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

Particulars of Offence

PETUELI VARAMASI TEROTUME on the 23rd day of March 2024 at Nadera, Suva in the Central Division, unlawfully and indecently assaulted **LR** by procuring **LR** to suck his penis.

Count 8

Statement of Offence

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

Particulars of Offence

PETUELI VARAMASI TEROTUME on the same occasion as count 7 at Nadera, Suva in the Central Division, penetrated the vagina of **LR**, a child under the age of 13years, with his finger.

Count 9

Statement of Offence

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

Particulars of Offence

PETUELI VARAMASI TEROTUME on the same occasion as count 7 and 8 at Nadera, Suva in the Central Division, penetrated the vagina of **LR**, a child under the age of 13 years, with his penis.

- [3] The accused denies having committed the offences.
- [4] The accused faces multiple counts of rape and sexual assault against LR, a child under 13 years, committed on 4 separate occasions over a three-year period. The first set of counts, being counts 1 to 3, pertain to two occasions on unknown dates in 2021. On the first date, the accused is alleged to have sexually assaulted LR by rubbing her vagina with his hand. The second occasion in 2021, the accused is alleged to have sexually assaulted the complainant by rubbing her breasts with his hands and then penetrated LR's vagina with his penis.
- [5] The second set of counts, counts 4 to 6, are alleged to have occurred on 20 March 2024. The accused is alleged to have sexually assaulted and raped LR on this date. There are two counts of sexual assault in respect to procuring the complainant to suck his penis as well as sucking LR's breasts with his mouth. Count 5 alleges that the accused allegedly penetrated LR's vagina with his penis.
- [6] The third set of counts, counts 7 to 9, relate to alleged assaults on 23 March 2024. The accused is alleged to have sexually assaulted the complainant by procuring her to suck his penis as well as raped her digitally and with his penis on the same date.

Counts 3, 5, 8 & 9 – Rape

[7] The offence of rape has three elements: the penetration of a complainant's vagina, anus or mouth by an accused with their penis, finger or an object, the complainant not consenting to sexual penetration, and the knowledge of the accused that the complainant was not consenting.¹ The slightest penetration is sufficient to establish the element of penetration.

[8] As the complainant here is alleged to have been under 13 years, it is not necessary for the prosecution to establish that she did not consent or that the accused knew that the complainant did not consent to the penetration.²

[9] To establish each of the four counts of rape in the present case, the prosecution must prove the following elements beyond a reasonable doubt:

1. That on a date in 2021, on 20 March 2024 and on 23 March 2024 the accused penetrated LR's vagina with his penis. Also, on 23 March 2024 the accused penetrated LR's vagina with his finger.
2. That LR was under the age of 13 years at the time.³

Counts 1,2,4,6 & 7 – Sexual Assault

[10] Sexual assault is an offence contrary to s 210(1) and (2) of the Crimes Act.

[11] To establish the offence of sexual assault, the prosecution must prove the following elements beyond a reasonable doubt:

1. That on a date in 2021 the accused rubbed LR's vagina with his hand, on another date in 2021 he rubbed LR's breasts with his hands, on 20 March 2024 the

¹ Section 207(2).

² Section 207(3).

³ It is not disputed that LR was under 13 years. Her birth certificate was produced in evidence – Prosecution Exhibit 2.

accused procured LR to suck his penis as well as sucked LR's breasts with his mouth and on 23 March 2024 procured LR to suck his penis.

2. The assaults were unlawful and indecent.

Burden of proof and assessment of the evidence

[12] The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence.

[13] The accused chose to give evidence, but he does not carry any burden to prove or disprove anything. The burden remains on the prosecution to prove his guilt beyond a reasonable doubt.

[14] The burden is on the prosecution to prove the charges beyond a reasonable doubt. Each element of the charge must be proved but not every fact of the story. If there is a reasonable doubt, so that the Court is not sure of the accused's guilt, or if there is any hesitation in my mind on any of the elements, the accused must be found not guilty of the charges and acquitted.

Approach to the assessment of the evidence

[15] I approach the evidence dispassionately, without sympathy or value-laden rules regarding how men and women should conduct themselves. It is entirely a matter for me to decide which witnesses are credible and reliable and which part of their evidence I accept as true.

[16] The prosecution's case is dependent upon the complainant's evidence. She is 12 years old. Her evidence does not require corroboration. The identity of the accused is not an issue in this case. He claims that he did not commit the alleged offences.

Prosecution Evidence

- [17] The relationship between LR and the accused is not in dispute. The accused is married to LR's mother. The accused is LR's stepfather. LR has two younger brothers. Also not in dispute is the fact that LR was born in November 2012.
- [18] The Prosecution called one witness, being the complainant. The written Police Statements for two of LR's cousins, aged 11 and 14 years, were admitted by consent.
- [19] LR is 12 years old. She stated that her father died when she was about 4 years old and that she met the accused in 2021 when he came to live with her, her mother and her two brothers at their home. LR was aged 8 for most of 2021 until her 9th birthday in November. She and her two brothers attended school. Her mother worked and would not return home until about 5pm. After school LR would walk home from school with her brothers. The accused would be at home. She called him 'dad' at her mother's request. She stated that the accused treated her and her brothers normally, asking them to do chores, bath, do their homework and clean their room. She stated that it was very annoying having him at the house because she did not want to have a stepfather as she missed her own father. Her other evidence in chief was as follows:
- i. LR stated that something happened in 2021. She stated that that year the accused started being abusive toward her and her siblings. He pulled her hair and he hit her brother's heads against the wall when he was unhappy with him. He also touched her body sometimes. She told her mother about the beatings but her mother told her that it was her own fault.
 - ii. In respect to the touching, LR stated said the first time was after school. Her mother was at work. LR was lying on the bed in her parent's room. The accused came into the room, closed the door, lay on the bed with her and put his hands in her pants. She was wearing t-shirts, shorts and panties. He put her his hand on top of her pants and she said it felt like scratching on her vagina. LR could not recall if the accused used his left or right hand. The accused

asked her whether she liked it and she said no. He then got up and walked out. Before he left, the accused told LR not to tell anyone. LR stated that she did not tell her mother later because she was afraid of her mother as her mother whacked her with a wooden spoon. She also did not tell her brothers because they had '*big mouths*'.

- iii. The next day after school when she got home the accused told her to go into the bedroom to charge his phone. He followed her and locked the door and she realised he would do the same thing to her. She stated the accused touched her breasts. She laid on the edge of the bed on her back and the accused pulled down her pants and put his penis into her vagina. After a few minutes he stopped and then wiped her vagina and went outside to smoke. LR stated she thought it was her fault and started crying. She thought it was her fault because she should not have let him put his penis inside her vagina. She described the alleged rape in more detail. She stated that she was lying on the edge of the bed and he was standing next to the bed. She used dolls to demonstrate what had happened. The girl doll's legs were hanging over the edge of the bed and the male doll had his groin in the groin of the female doll. She did not tell her mother when she got home because she did not think her mother would believe her. She explained that as she was growing up, when she was young, she used to lie a lot. She did not tell anyone at school or elsewhere what had happened to her. LR stated that she did not tell anyone because she was scared of what the accused has said to her, namely that she was not to tell anyone.

- iv. The next occasion was on 20 March 2024. She was at home with her stepfather and her brothers. Her mother was at work. At about midday, some relatives came and picked up her two brothers. LR was then alone at the home with her stepfather. The accused then closed the windows and doors to the house and gestured for LR to go into her parent's room which she did. She was asked why she did so and explained '*Because it was happening for a long time, and I just couldn't stop myself*'. He then went into the room. He took off her clothes. The accused told LR to suck his penis. He then lay on the bed and she sat on top of him and he held her waist and lifted her up and down on his penis. After

that he told her to lay on the bed and he stood up and put his penis into the front part of her vagina. He did this for several minutes and the LR saw a white liquid come out. The accused wiped the liquid off himself and wiped her vagina as well. She used dolls again to demonstrate the incidents. In respect to the first incident, the female doll had her knees on the floor whilst the male doll was standing upright. The female's face was in the male's groin area. The dolls were used for the second incident - the female doll was sitting on top of the groin area of the male doll as the boy doll was lying down on his back. LR stated that her stepfather had removed her underpants before she sucked his penis. She stated that she felt the penis inside her vagina. She used a diagram of a girl to circle where the penis was put inside her vagina – LR drew a circle around the vagina (**Prosecution Exhibit 1A**). LR also used a diagram of an adult male to draw a circle around the penis (Prosecution Exhibit 1B). She stated that the accused's penis was inside her vagina. The complainant also stated that the accused touched her breasts, squeezing it with his hands. She had her t-shirt on but he did so underneath her t-shirt. The accused went outside to smoke and LR went back and played on her phone. Her relatives later came back to pick her up. Again, she did not tell anyone what had happened.

- v. On 23 March 2024, LR was at home. It was about midnight and everybody was asleep. LR was still awake on her phone. The accused was sleeping in the bedroom with her mother. LR was in the lounge lying on a mattress with her two brothers next to her. The accused got up to go to the washroom and when he came back from the washroom he pulled down her pants. The accused put his penis inside her vagina for several minutes. Again, the white liquid came out and he cleaned it using one of the curtains. She described the layout of the living room. She stated that her brother was on one side of her and that she moved over away from her brother when the accused was raping her. She stated that the kitchen light was on. She used the dolls to describe the positions and actions of the accused and herself. She said that her brothers did not wake up when this happened.

[20] On 24 March 2024, LR went out for dinner with her relatives. Her Aunt took her aside and asked her whether anything bad had happened to her. LR said no but the Aunt told LR that her two cousins had told the Aunt what had happened – it appears that LR had earlier told her cousin(s) about the assaults by the accused. The Aunt asked whether the allegations were true and LR then informed the Aunt of the alleged assaults. When asked why she lied to her Aunt LR stated that she believed that if she told the truth the accused would go to jail and she did not want this to happen. They then went to the Police Station to report the matter and on the way picked up her mother to inform her – LR stated that her mother was surprised when told. The birth certificate of the complainant was produced as Prosecution Exhibit 2.

[21] LR provided the following evidence in cross examination:

- i. LR loves her stepdad as he was good to her.
- ii. LR was aware that the accused had a house in Cunningham and that he had sold it but did not know when. It was put to LR that it was sold in December 2021 and that it was only at that time that the accused came to live in their house. She said she could not recall.
- iii. LR stated that the incidents in 2021 happened before her birthday in November. She agreed that at the time of the alleged offences she was eight years old and much smaller than she is now. It was put to her that the events in 2021 did not happen. I found this part of the evidence somewhat confusing to follow. LR stated in response to questions about the alleged offending in 2021 that *'I don't know'*, *'I'm not sure'* and *'yes'* in response to the question that the incidents did not happen that year. I observed that LR was looking confused while giving this evidence and I therefore informed LR that if she did not understand the question she should say so.
- iv. It was put to her that there were no more similar incidents in 2022 which she agreed. It was put to her that nothing happened in 2023 but she said something happened.

- v. She was then referred to the events on 20 March 2024. She confirmed that she did suck the accused penis. She agreed that the accused is taller than her but did not accept that she could not reach his penis if she was kneeling and he was standing. It was put to her that the accused's penis did not go inside but must have gone outside to which she said yes. It was put to LR that none of the incidents on 20 and 23 March happened. She stated they did and that he did rape her.
- vi. LR agreed that she did not complain on 24 March but in fact her Aunt came to her. She stated that she told her cousins everything that had happened to her. She stated that she was telling the truth.

[22] In re-examination, LR stated that she was confused when she stated in cross-examination that she did not know. She stated that the incidents did happen and that the accused did rub her vagina with his hand and did rub her breasts and did put his penis into her vagina. She confirmed that she told her cousins everything that the accused had done.

[23] The written police statements for LR's two cousins were admitted in evidence by consent. One of her cousins is aged 11 years old. She stated that the complainant told her about the rape in about January 2024 and that the accused had done it. She stated that LR had told her to keep it a secret as her mother would be sad because her stepfather would go to jail. The second cousin is aged 14 years and advised that the 11 year old cousin had told her in January 2024 about the assaults. The 14 year old cousin then asked LR whether it was true to which LR confirmed the same. LR told the cousin that she was scared to tell anyone else about the rape because LR's mother would get angry at LR for making her stepfather go to jail.

[24] The Prosecution then closed its case.

[25] Mr Cakau made a submission of no case to answer in respect to counts 3, 7 and 8 on the basis that no evidence had been provided by LR on the same. Ms Ratukalou conceded that there was no evidence in respect to counts 7 and 8 but submitted that there was evidence in respect to count 3 including the evidence from the demonstration by LR using the dolls.

[26] I determined that there was no evidence in respect to counts 7 and 8 and, thus, no case to answer in respect to these charges. However, I found that LR had provided evidence in respect to the elements of counts 1, 2, 3, 4, 5, 6 and 9 and, thus, the accused had a case to answer in respect to these charges.

Defence's Evidence

[27] I put the three options to the accused, being to provide sworn evidence, remain silent or call witnesses. I informed the accused that it was his right to remain silent and no adverse inference would be drawn. The accused chose to provide evidence and call a witness.

[28] The accused's evidence in chief was as follows:

- i. Up until December 2021, he was residing at his home at Cunningham. He sold his house that month and then moved into his wife's house at Nadera. His wife is LR's mother. They married in 2022.
- ii. His wife has three children, including the complainant. Before he moved into his wife's house, he had been visiting his wife.
- iii. He described his wife's children as being like his own. He stated that he was previously married and has three children, two daughters and a son. He stated that he treats his wife's children the same and disciplines them in the

same manner as his own children. He would discipline them by not allowing them to do activities they wished to do or by giving them a small smack. He never pulled LR's hair and did not bang her brother's heads against the wall.

- iv. The allegations from 2021 and 2024 were put to the accused. He stated that they were not true and that he did not do the things that were alleged by the complainant.
- v. The accused stated that he worked as a private contractor in construction. As such, his hours were generally his own.

[29] In cross-examination, the accused stated that could not recall when he met his present wife – it was put to him that they started seeing each other in 2018. He accepted that he had an office at home and that when he was not at the construction site, he worked from home. He confirmed that his wife did not raise any issues about the complainant to the accused from 2021 to 2023. The specific allegations by LR were put to the accused which he denied. With respect to the allegations on 20 March 2024, the accused accepted that LR's two brothers were picked up and that his wife was at work. When it was put to the accused that only the accused and LR were at home, the accused stated that his uncle was also at the house – this was not put to LR in cross-examination. The accused stated that he could not have committed the offences that day as his uncle was present and would have seen the same.

[30] The Defence called LR's mother, DW2. DW2 was working between 2021 and 2023. She confirmed that the accused sold his house in December 2021 and moved into her house at that time. She stated that she loved her children and they were her first priority before her marriage. She also loves her husband and trusts him. She described the accused as a very good and supportive father who loved her kids as his own. She also stated that there was no unusual behaviour by the complainant between 2021 and 2024.

[31] DW2 stated that on Palm Sunday in 2024 between 7 and 8pm, the children's paternal Aunt visited her at home and asked if she could speak to her outside. The Aunt then told DW2 about the allegations by LR against the accused. They then went to the Police Station to report the matter. She said that when she heard the allegations from her daughter to the police, she was very shocked and very disturbed as she had never noticed any unusual behaviour from LR.

[32] In cross-examination, DW2 stated that she supported her husband. She stated that her uncle was staying with them and would bring the children home from school and be with them at home – it was not put to LR in cross-examination that DW2's uncle was at home at the material time when the alleged offending occurred.

Decision

[33] The accused is the stepfather of the complainant. The complainant's father passed away when she was young and from at least 2021 the accused and the complainant's mother were in a relationship. It appears that at some point in time in 2021, the accused moved into the complainant's home.

[34] It is the complainant's evidence that the accused sexually assaulted and raped her on several occasions from 2021 to March 2024. The first three counts pertain to assaults on two separate occasions in 2021. The complainant's evidence is that on the first occasion, the accused put his hand inside her pants and rubbed her vagina with his hand. He stopped when she told him that she did not like it. The accused told LR not to tell anyone. On the second occasion, being the next day, the complainant states that the accused touched her breasts with his hand. He made her lie down on the bed and he stood next to the bed and penetrated her vagina with his penis.

[35] The next two occasions were in March 2024. The first on 20 March 2024. There is no dispute that on this day LR's mother was working and her two brothers were out with

relatives. LR states that she was home alone with the accused. The accused states that his uncle was also at the house. The complainant states that the accused told her to go into the bedroom and that he followed her into the room and proceeded to make her suck his penis as well as penetrated her vagina with his penis. The accused also squeezed her breasts with his hands.⁴ The fourth and final occasion was on 23 March 2024. The complainant states that at about midnight while she was lying on a mattress in the lounge the accused penetrated her vagina with his penis.

[36] The accused denies the allegations. He states that they simply did not happen.

[37] There is, then, two competing versions of the material events. I remind myself that the burden to prove the accused's guilt beyond a reasonable doubt lies with the Prosecution throughout the trial and it never shifts to the accused. If I accept the accused's version then none of the incidents occurred. Even if I reject the accused's evidence, the Prosecution must still prove beyond reasonable doubt that the offences occurred. I must be satisfied beyond reasonable doubt that the offending occurred. I must be sure of the truth of the complainant's evidence.

[38] I keep in mind the following factors when determining the credibility and reliability of a witness such as: promptness, spontaneity, probability, improbability, consistency, inconsistency, contradictions, omissions, interestedness, disinterestedness, bias, and the demeanour and deportment in court.⁵ It is helpful (before assessing the complainant's evidence) to note the following remarks by Rajasinghe J in *State v SS* [2024] FJHC 133 (23 February 2024):

13 ...it is prudent to briefly discuss the applicable approach in evaluating the evidence of child witnesses. The Fiji Court of Appeal in Alfaaz v State [2018] FJCA 19; AAU0030.2014 (8 March 2018) held that:

⁴ Count 6 alleges that the accused sucked LR's breasts with his mouth on this occasion.

⁵ See *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomon Qurai* (HC Criminal - HAC 14 of 2022).

“In R v Powell [2006] 1 Cr.App.R.31, CA it was held inter alia that infants simply do not have the ability to lay down memory in a manner comparable to adults and special effort must be made to fast-track such cases. I think the same reasoning is applicable to a child of 07 years as well. Therefore, one would not expect perfectly logically arranged evidence in the case of a child witness particularly when the child is the victim of the crime and probably carries both physical and psychological scares with her.

It had been remarked regarding an adult victim of rape in Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280 that:

“(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

The Supreme Court in Lulu v State Criminal Petition No. CAV0035 of 2016: 21 July 2017 [2017] FJSC 19 said referring to Bharwada in the context of apparent discrepancies in an adult rape victim’s recollection but which do not shake the basic version ‘Their evidence is not a video recording of events.’ In my view, one has to be even more generous with and understanding of the evidence of a child witness who may have been traumatized by a completely alien experience in cases of rape and other forms of sexual assaults affecting her ability to narrate the incident in graphic details”

14. Given the above passage of Premathilaka JA in Alfaaz v State (Supra), it is essential to note that **children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for many reasons, such as age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult.** Children may not fully understand what they are describing and may not have the words to describe it. They may be embarrassed to talk about incidents of a sexual nature or use words they think are bad and, therefore, find it difficult to speak.

15. A child may not fully understand the significance of sexual activities, which may be reflected in how they remember it or describe it. **A child's memory is different from that of an adult. A child's memory can fade even within the short term. When recounting events later, even after a reasonably short time, a child's recall of when and in what order events occurred may not be accurate.** A child may be unable to speak of the context in which those events happened. A child may have difficulty dealing with conceptual questions such as how she/he felt some time ago or why she/he did or did not take a particular course of action.

16. Accordingly, evidence of the child witness must be evaluated by referencing factors appropriate to her strengths and weaknesses related to her age, mental development, understanding and ability to communicate. (vide; Nalawa v State [2021] FJCA 188; AAU014.2016 (25 June 2021)).⁶

[39] I will deal first with the complainant's evidence. She was about 8 or 9 years old in 2021. She was only 12 when she gave evidence. I observed her to be more mature than her years. She was composed and spoke clearly about intimate sexual matters that most children her age would have difficulty expressing in words.

⁶ My emphasis.

[40] There is no obvious reason why LR would make up these serious allegations against the accused. While she was initially annoyed with him moving in, she stated that she loved the accused and did not want to report the offending because she did not wish for the accused to go to jail. Are these then the fictional stories of a child? While LR acknowledged in her evidence in chief that she told lies when she was younger (as do many children) there is no evidence before me that LR had any history of making up fanciful stories or false allegations. Having carefully considered LR's evidence I am sure that LR has been truthful in her evidence. My reasons are these:

- i. As I have indicated I found LR to be mature and self-aware in the manner she gave evidence. This was also manifested in her acknowledgement in examination in chief that she lied when she was younger. It was apparent from her manner and demeanour, along with her description of the alleged assaults, that the alleged offending had become normalised to her. She was at times somewhat robotic in her description of the alleged rapes. It was apparent that through normalisation she had become resigned to the sexual offending in her house. For example, on 20 March 2024 she states that the accused gestured for her to go to the bedroom which she did without hesitation, understanding that another alleged assault was to be committed on her. On 23 March 2024, the accused allegedly raped her while she continued watching her phone.
- ii. LR's use of the dolls to demonstrate the offending was entirely in keeping with her description of the allegations. The demonstrated sexual behaviour is not activity a child of 12 years is normally exposed to or aware of. The Defence have raised an objection to this evidence on the basis that the accused was unable to observe the use of the dolls. That matter ought to have been raised during trial and measures could then have been taken to remedy it. As it was, and as the transcript records, when the dolls were first used I asked Ms Ratukalou to '*make sure that Mr Cakau can see everything as well*'. This was the time to raise the matter. In any event I do not consider that the accused was prejudiced given that his lawyer was able to observe LR's use of the dolls.

- iii. While I was surprised by LR's level of maturity, her demeanour was in keeping with the gravity of the offending. Her mood was at times flat and subdued when talking about the offending. She looked, at times, sad. In cross-examination, she was not defensive. She listened to the questions and accepted propositions from defence counsel and stated that she did not know if she could not recall. Except for a brief time when she appeared confused, LR remained steadfast that the offending did occur.
- iv. I found LR's explanations for not telling her mother or her brothers to be understandable and reasonable.
- v. In terms of the offending in 2021, I am satisfied that LR has truthfully described the assaults that occurred to her on the two unknown dates. The accused states that he did not move into LR's house until December 2021, after selling his own property and that the alleged assaults could not have occurred in 2021. He is supported in this respect by the evidence of LR's mother. LR appears to have accepted in cross examination that the offending could have happened later than 2021. I accept that the offending occurred as described by LR. I consider that it likely occurred in 2022, rather than 2021.
- vi. It was put to LR in cross-examination that she could not have kneeled to suck the accused's penis because he would have been too tall. In my view, LR's description of the incident could only plausibly occur, where the accused was alleged to have been standing, if she was kneeling. The Defence also argue that on LR's description of lying straight on the bed the accused could not have penetrated LR's vagina. I am satisfied that LR's use of the dolls to demonstrate the rape shows that the penetration was plausible.
- vii. The fact that LR did not come forward of her own volition to report the assaults (instead her Aunt confronted her about the matter) is consistent with her explanation as to why she did not inform anyone of the assaults – she did not wish for the accused to go to jail. Ultimately, she did tell her cousins. The delay doing so (some 2-3 years after the assaults began) is understandable for the same reasons. She was living under the same roof as

the accused. There was no escaping her situation. I also recognise that each person will have their own individual response to trauma, more so children.

[41] As the Defence point out, there are inconsistencies with LR's evidence. LR did not give evidence in respect to counts 7 and 8. She accepted in cross examination that the events in 2021 may not have happened or that she was not sure. The Court must take into account any inconsistencies to consider whether a witness is believable and credible. It is obvious that the passage of time can affect one's accuracy of memory. It cannot be expected that every detail will be the same from one account to the next. If there is an inconsistency, it is necessary to decide, firstly, whether the inconsistency is significant and, secondly, whether the inconsistency affects adversely the reliability and credibility of the witness. If it is significant, then it is for this Court to consider whether there is an acceptable explanation. If there is an acceptable explanation for the change, then this Court may conclude that the underlying reliability of the witness' evidence is unaffected. If the inconsistency is fundamental, then it is for this Court to decide to what extent it influences the reliability of the witness' evidence. As the Court of Appeal observed in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) at [16]:

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;

[42] It also useful to set out the following passages by Rajasinghe J⁷:

30. *Gamlath JA in State v Serelevu [2018] FJCA 163; AAU141.2014 (the 4th of October 2018) has extensively discussed the issue of delay in reporting. His Lordship found that "the totality of the circumstance test" is the correct approach to evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.*

31. *The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence if there is an unsatisfactory explanation for the delay or unexplained delay. (vide; Masei v State [2022] FJCA 10; AAU131.2017 (3 March 2022)).⁸*

[43] It is necessary when assessing the veracity of a witness' evidence to look at the totality of the picture. I am not surprised that LR did not remember all the offending – indeed I would have found it more surprising if she did. The events occurred a long time ago and much of the offending was similar in nature. It will not have been easy to recall the specific acts on each occasion. I formed the view when listening to LR's evidence in cross-examination that she was confused by some of the questions put to her in respect to the 2021 offending. My reading of the transcript confirms this. The initial question in this line of questioning was long, included several different questions and will have confused LR – as evidenced by her response, 'I don't know'. I formed the view at the time of hearing the evidence, and again this is confirmed when reading the transcript, that LR was unsure whether the incidents happened in 2021 or

⁷ In *State v Chand* [2024] FJHC 108 (23 February 2024).

⁸ My emphasis.

later – as opposed to being unsure whether the incidents had occurred at all. She confirmed in re-examination that the events did occur. I am satisfied that LR is a reliable and honest witness and that whilst she will not have recalled all the incidents or their timing she recalled the material aspects such as the penetration of her vagina on multiple occasions.

[44] The Defence argue that the Prosecution’s failure to produce any medical report undermines its case as there was no evidence provided of any injuries to the complainant. The Defence suggest that given the age of the complainant and the period of the alleged rapes, ‘*there is bound to be serious injuries of the hymen*’.⁹ Both counsel advised the Court that the complainant was medically examined and a report prepared by the medical practitioner. The Prosecution subpoenaed the medical practitioner who was on their list of witnesses. The Prosecution informed the Court at the commencement of the trial that it was not calling this witness and indicated that the Defence would call the doctor. The Defence later decided against this course and the medical report not produced. As such, I am aware that there is a medical report prepared but not aware of the content. In light of this, I have placed no weight on the fact that no medical evidence has been produced in this case. It would be entirely speculative to embark on an inquiry as to what the medical examination of the complainant showed or did not show.

[45] With respect to the written statements from LR’s two cousins which were admitted in evidence by consent, their evidence goes to the timing of LR first reporting the offending. This appears to have happened in January 2024. I have already found that there was a reasonable explanation for this delay.

[46] What then to make of the accused's evidence. I found his evidence to be unsatisfactory. His evidence was economical except for denying the allegations and stating that he did not move into the house until December 2021. He suggested that on 20 March 2024, his uncle was present at the house with him and the complainant.

⁹ Para 33 of Closing Submissions for the Defendant.

This was not put to LR in cross-examination and the accused's uncle was not called to give evidence.

[47] The Defence relied on the evidence of LR's mother, who stated that her daughter's behaviour did not change after the accused moved in or after the alleged assaults. She supports the accused and stated that whilst she loved her husband, she loved her children more. She was asked about the fact that the children came home after school and were with the accused alone. She stated that her uncle was living with them at the time and that the uncle walked the children home. Again, this uncle was not called to give evidence and this was not put to the complainant in cross-examination. Ultimately, DW2 was not present at the time of the offending and, therefore, had no direct evidence on the critical factual issues. Her evidence did not assist the Court.

Conclusion

[48] I do not accept the accused's evidence. Despite this, I remind myself that the accused carries no burden to prove or disprove anything. The burden remains on the Prosecution throughout to establish beyond reasonable doubt that the offending did occur.

[49] I am sure that LR is telling the truth and has described the offending as it happened to her. Her evidence was given without embellishment and was clear and precise. The use of the dolls and the diagrams only served to reinforce her descriptions, making it clear what the accused had done to her. I am satisfied beyond a reasonable doubt that in either 2021 or 2022 the accused rubbed LR's vagina with his hand and on the next day touched her breasts with his hands and penetrated her vagina with his penis. Further, that on 20 March 2024 the accused procured LR to suck his penis and penetrated her vagina with his penis as well as squeezed her breasts with his hands. Finally, on 23 March 2024, the accused penetrated LR's vagina with his penis.

[50] In respect to counts 7 and 8, LR provided no evidence on these charges and I find the accused not guilty and he is acquitted on these two counts. However, I find the

accused guilty as charged of counts 1, 2, 3, 4, 5, 6 and 9, and he is, accordingly, convicted on these counts.



D. K. L. Tuiqereqere

JUDGE

Solicitors:

Office of Director of Public Prosecutions for the State
Vosarogo Lawyers for the Accused

