

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 63 of 2023

THE STATE

-v-

XY

**Counsel: Mr. T. Tuenuku for the State
 Ms. V. Kirti for the Accused**

Date of Trial: 27 – 28 August 2025

Date of Judgment: 24 October 2025

JUDGMENT

1. The accused pleaded not guilty to seven counts of sexual offending against his 10-year-old biological daughter. To protect her identity, I shall refer to the accused as XY, and to the complainant as CC in this Judgment.

2. XY (“the accused”) is charged with the following seven counts:
 - (i) Indecent Assault, contrary to section 212(1) of the Crimes Act 2009, the particulars being that, on 6 August 2023, at Siberia, Labasa, he unlawfully and indecently assaulted CC by kissing her on her mouth (count 1).

 - (ii) Sexual Assault, contrary to section 210(1)(a) of the Crimes Act 2009, the particulars being that, on 6 August 2023, at Siberia,

Labasa, he unlawfully and indecently assaulted CC by licking her breasts (count 2).

- (iii) Sexual Assault, contrary to section 210(1)(a) of the Crimes Act 2009, the particulars being that, on 6 August 2023, at Siberia, Labasa, he unlawfully and indecently assaulted CC by rubbing his penis on her vagina (count 3).
- (iv) Sexual Assault, contrary to section 210(1)(a) of the Crimes Act 2009, the particulars being that, on 6 August 2023, at Siberia, Labasa, on an occasion other than in count 3, he unlawfully and indecently assaulted CC by rubbing his penis on her vagina (count 4).
- (v) Rape, contrary to section 207(1) and (2)(a) and (3) of the Crimes Act 2009, the particulars being that, on 6 August 2023, at Siberia, Labasa, he penetrated the anus of CC with his penis, CC being a child under the age of 13 years (count 5).
- (vi) Sexual Assault, contrary to section 210(1)(a) of the Crimes Act 2009, the particulars being that, on 19 August 2023, at Siberia, Labasa, he unlawfully and indecently assaulted CC by fondling her breasts (count 6).
- (vii) Sexual Assault, contrary to section 210(1)(a) of the Crimes Act 2009, the particulars being that, on 19 August 2023, at Siberia, Labasa, he unlawfully and indecently assaulted CC by licking her vagina (count 7).

The prosecution case

3. CC gave unsworn evidence from the child-friendly room at the Labasa Court Complex.

4. CC said that, in 2023, she was living together with her parents and siblings in a two bedroom house in Siberia. Her parents shared one bedroom and she shared the other bedroom with her siblings.
5. On the morning of 6 August 2023, she was preparing to go to church with her mum when her father said that he had leg pain. She stayed at home with him and her brother. After her mum left for church, her father sent her brother to bring Panadol and oil from her grandfather's place. After her brother left, her father called her into his room. He was lying on the bed and called her to come close to him. He then took off her clothes and made her lie on the bed. He then lay on top of her and kissed her on her lips and licked her neck. When her brother came back, she wore her clothes. Her father told her brother to bring suki from her grandfather's place. When he left, her father called her back into his room. He made her lie on the bed. He removed his clothes and her clothes and rubbed his penis on her vagina from the back. She was crying and her father told her not to cry and that he was her father. He then told her to wear her clothes, and she went to her room. When her brother returned, she did not tell him about what her father did to her because he had told her not to tell anyone. When her mum returned from church, she did not share anything with her.
6. At a later date, her father came home from a party. He told her mum that he was feeling hot, and he came to sleep in her bedroom. He put his hand inside her dress and touched her breast. He removed his pants and her dress. After a short adjournment for CC to rest and have a snack, and to refresh her memory from her witness statement, CC said that her father had taken off her tights and panty and licked her vagina after he touched her breast on 19 August 2023. Before this happened, her dad asked her mum to bring a mosquito coil to her room.
7. The following morning, her mum knew that something was wrong and forced her to tell. She told her mum that her father had touched her breast and licked

her vagina. She also told her mum that he had touched her vagina with his penis.

8. When Mr. Tuenuku sought to clarify what the accused had done to CC on 6 August 2023, she said that her father had rubbed his penis on her vagina. His penis did not go inside her vagina.
9. In cross-examination, CC said that her father was a mechanic, and sometimes goes out fishing when he wants to eat fish. Her father does not go to church. The pastor usually picks her and her mother at around 7am to 7.30am. They return home from church at around 11am. When it was suggested to CC that her father had gone fishing with Bobby on 5 August 2023, CC replied that Bobby is a liar.
10. When Ms. Kirti suggested that the accused had brought food home from the party to share with the family, CC said that he did not bring food. When it was suggested that her mother had told her to make up a story against her father, CC denied that. When Ms. Kirti further suggested that her father had not kissed her, rubbed his penis on her vagina, touched her breast or licked her vagina, CC said that he had done those things to her.
11. CC's mother ("CM") testified that she is married to the accused and they have four children. CC is their eldest child.
12. One Saturday night, the accused said that he was hot and went to sleep in CC's room. When she went to light a mosquito coil, her daughter was under the blanket. Later, when she peeped into CC's room, she saw half of the accused's body was on her daughter. After a while, her husband called to her and said for their son to go to lie with him. Her son went and CC came to her, asked for the phone and went to the toilet. Her husband said to put the mattress in the living room for them all to lie together. She suspected that something had happened to her daughter. When the accused came to lie

down, the zip for his pants was down. She never said anything to him because she was worried about her life with her children.

13. The following morning at church, her daughter looked different. She asked CC what she and her father had been whispering about. At the third time of asking, CC shed tears. She asked CC whether the accused was touching her last night. CC was crying and told her everything. She said that the accused had licked her vagina, sucked her breast and licked her neck. At first, she did not believe it because it was never in her dreams that CC's father would do that to her. CC told her that it was the second time that the accused had done that to her.
14. In cross-examination, it was suggested to CM that when she started her relationship with the accused 15 years ago he was already in a relationship with one Shael, and that all three had lived together before CM chased Shael away whilst the accused was out fishing. CM denied this, and explained that the accused had eloped with Shael around 9 years ago when CM was 8 months pregnant with their son. When it was suggested that, in June/July 2023, she had accused the accused of visiting Shael on the pretext of going crabbing, and threatened that if he ever goes to Shael again he would not be able to stay with Shael or her, CM denied that.
15. When Ms. Kirti pointed out that CM had not included in her witness statement the fact of seeing the accused lying on CC, CM replied that the police had informed her that whatever was not in her statement must be said in court because she has to tell the truth. CM rejected the suggestion that she had told her daughter to lie to the police and to make up the story against her father.
16. When the Court sought to clarify with CM whether she knew or believed that her husband had an ongoing relationship with Shael, she replied that she did not believe that, and Shael was already re-married.

17. Dr Chand gave evidence remotely from Suva. He examined CC at Labasa Hospital on 20 August 2023 at 2pm. She was crying and scared. He found that CC's perineum – the structures around the vagina – was red and swollen. Her hymen was intact. In Dr. Chand's opinion, the redness and swelling was consistent with the rubbing of the perineum with something blunt.
18. Before closing the prosecution case, Mr. Tuenuku sought leave to amend count 2 to reflect CC's evidence that the accused had licked her neck (not her breast, as originally particularised). Mr. Tuenuku also very properly acknowledged that there was no evidence supporting count 4 and count 5. There being no objection to the proposed amendment, and clearly no prejudice to the accused, I allowed the amendment of count 2.

Defence submission of no case to answer

19. At the close of the prosecution case, the defence made an 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 to count 4 and count 5.
20. I ruled that there was no case to answer on count 4 and count 5, and there was a case to answer on counts 1, 2, 3, 6 and 7.
21. The accused elected to give evidence in his own defence, and informed the Court that he would call two defence witnesses.

Defence Case

22. The accused testified that he is a driver, mechanic and fisherman.
23. On 5 August 2023, Bobby picked him up from home to go fishing. He dropped the accused at Subrail Park, and the accused embarked on a trip to Mali Island together with Manik in Manik's boat. Kariga and Suren were in a second boat. When they reached Mali at around 6pm, the accused's boat broke down. They

bobbed around on the waves all night. At around 7.30am to 8.30am on 6 August 2023, Kariga helped fix their boat, and they slowly returned to Subrail Park. The accused arrived home after 3pm.

24. On 19 August 2023, between 6pm to 8pm, he was drinking grog at his uncle Sushil's place. He then attended a birthday party at Bobby's place before returning home at around 2am the following day. He brought a parcel of food which he shared with his family. He slept in the sitting room with his wife and younger daughter, and his other children slept in their bedroom.
25. The accused denied all the allegations against him and said that his wife told his children to make allegations against him. His wife was jealous because she believed he was involved with a woman named Shael. In August 2023, he went crabbing at Namara, and his wife was angry because she believed that he went to Namara to visit Shael.
26. In cross-examination, the accused maintained that he arrived home after 3pm on 6 August 2023. When pressed on why CC would tell lies about him, the accused said that she was provoked by CM, and that CM has a disease in her head. He denied that he sent his son to get Panadol and oil so that he would be left alone with CC. He further denied sexually abusing CC on 6 August 2023.
27. When Mr. Tuenuku put to the accused that he had sexually abused CC when he returned from a birthday party in the early hours of 19 August 2023, the accused denied that. He said CC would have screamed if anything happened to her.
28. Mr. Abdul Munif testified that he is also known as Bobby. He is the accused's neighbour and has known him for around 6 years. He said that he invited the accused to his daughter's birthday party on 5 August 2023. The accused left the party at around 2am the following day.
29. Mr. Rajend Kumar testified that he is also known as Kariga. He knows the accused because he went fishing with Manik. On 5 August 2023, they went

fishing in two boats. Manik's boat broke down, and they returned to Subrail Park at around 6.30am on 6 August. They did maintenance on the boats followed by a grog session. The accused cleaned and cooked fish. The accused went home between 1pm to 2pm.

30. In cross-examination, Mr. Kumar said that he was not sure what time the accused went home on 6 August 2023. He met the accused for the first time on 5 August 2023. The last time he saw the accused was 6 August 2023. When it was suggested that he may be mistaken about being together with the accused on 6 August 2023, Mr. Kumar maintained that he could remember being together with the accused on that day. In answer to a question from the Court, Mr. Kumar said that Manik goes fishing twice a month and always goes with different labourers.

Closing submissions

31. I heard closing speeches on 28 August 2025, and I have also considered written submissions filed by both parties.
32. In her closing speech, Ms. Kirti quite properly acknowledged the contradictory versions given by the alibi witnesses. She said that the defence is not relying on the evidence of Mr. Abdul Munif. She maintained that Mr. Rajend Kumar supports the accused's evidence that he was at Subrail Park on the morning of 6 August 2023. Ms. Kirti also urged the Court to accept that CM had a motive to influence CC to make false allegations against the accused.
33. In her written submissions, Ms. Kirti reminded the Court that the prosecution bears the burden of disproving an alibi to the criminal standard. She also cited relevant cases on recent complaint evidence.
34. In dealing with the alibi defence, Mr. Tuenuku highlighted that Bobby testified that the accused was at his place until around 2am on 6 August 2023. This directly contradicts the accused's evidence that Bobby drove him to Subrail Park to go fishing on 5 August 2023. Mr. Tuenuku submitted that Mr. Kumar's

evidence is unreliable because the labourers on Manik's boat were constantly changing. As for the defence case that CM had influenced CC to make false allegations, Mr. Tuenuka submitted that this is nonsensical. There is simply no evidence that CM influenced CC to make false allegations against her father.

35. The prosecution submit that CC is a credible and reliable witness. Mr. Tuenuka also argues that there is evidence that the accused interfered with witnesses, which evinces his consciousness of guilt.

Legal Directions/warnings

36. 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 in relation to each count separately, I am not sure that the accused is guilty, my verdict must be not guilty. The issue I must determine boils down to 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.
37. CC is a young child. She was around 10 years old at the time of the alleged offending, and 12 years old at trial. It is for me to decide whether she is reliable and has told the truth. The fact that she is young does not mean that her evidence is any more or less reliable than that of an adult. I must assess her evidence in the same fair way as I assess the other evidence in the case.
38. Because CC is so young, 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 to accurately or precisely to describe things in the same way that an adult might.

39. 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.
40. 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.
41. These things are relevant to a child's level of understanding rather than to their credibility.
42. None of these things mean that CC is or is not reliable, that is a matter for my judgment.
43. Since the accused relies on alibi, I remind myself that the defence bears no burden of proving an alibi. It is for the prosecution to make me sure that the accused does not have an alibi for the times of the alleged offending. Also, the fact that I am sure that the alibi raised is false does not of itself prove guilt. A false alibi may sometimes be raised by an accused person who thinks that it is easier or better for them to invent an alibi than to tell the truth. Sometimes an innocent person who fears the truth may not be believed may instead invent an alibi.
44. Since the defence has advanced CM's alleged jealousy as a motive for her to have counselled CC to have lied about the accused sexually assaulting her, I warn myself that the accused bears no onus to prove a motive to lie, and rejection of the motive asserted does not necessarily justify a conclusion that the complainant's evidence is truthful. A motive to lie or be untruthful may substantially affect the assessment of the credibility of a witness, but it would be wrong to conclude that the complainant told the truth because there is no

apparent reason for her to lie. There might be a reason for her to be untruthful that nobody knows about.

45. The prosecution has placed some reliance on CC's complaint to her mother as supporting her credibility. I remind myself that a complaint is not evidence of truth. Also, just because a person gives a consistent account about an event does not necessarily mean that account must be true.
46. Having said that, in cases of rape and other sexual offences, evidence that the complainant made a complaint is admissible to show that her conduct in complaining was consistent with her evidence in the witness box. In order to be admissible, the complaint must have been made at the first reasonable opportunity. It is a matter for the court to determine whether the complaint was made as speedily as could reasonably be expected.
47. Finally, in considering the fact that, when giving her evidence, CC appeared at times to be emotional and distressed, I need to bear in mind three things. First, there is no "normal" reaction to sexual offending. Some people will show emotion or distress and may cry. But other people will seem very calm or unemotional. Second, it is possible for someone to put on an act if they choose to. Third, even if a complainant's distress is not feigned, it is not necessarily indicative of the accused's guilt.

Analysis

48. It is not disputed that CC is the accused's biological daughter. Identity is not in issue.
49. The defence says that the allegations against the accused have been concocted, and are false. They have advanced motives for these allegations to have been fabricated. I shall return to these motives below.
50. Since I must acquit the accused on the charges relating to alleged offending on 6 August 2023 unless I reject his alibi evidence, it is convenient to deal with

this aspect of the case first.

51. I am sure that the accused was not at Subrail Park after returning from a fishing trip on the morning of 6 August 2023. Bobby's evidence totally undermines the accused's evidence that he went fishing on 5 August 2023, and did not return home until the afternoon of 6 August 2023. Even if Bobby was mistaken in his recollection of dates, it is inherently unlikely that Mr. Kumar could reliably recall having been with the accused on the morning of 6 August 2023 when he only met the accused on one occasion and, by his own account, there had been very many different labourers on Manik's boat in the period between August 2023 and the date of trial.
52. CC's account of her father making an excuse to be left alone with his children when his wife went to church, and sending her brother on an errand in order to be left alone with CC, has the ring of truth about it. CM testified that there was a Sunday when she went to church and the accused said that his leg was sore and he wanted the children to stay back and step on his leg.
53. The prosecution case relies heavily on my assessment of CC's reliability and credibility. Essentially, what it boils down to in relation to count 1 is whether I am sure that the accused kissed CC on her mouth. In relation to count 2, am I sure that the accused licked CC's neck. In relation to count 3, am I sure that the accused rubbed his penis on CC's vagina. To find the accused guilty on count 6, I must be sure that he fondled CC's breasts. To find the accused guilty of count 7, I must be sure that he licked CC's vagina.
54. CC was able to understand the questions being asked of her, and to provide appropriate answers. I have no doubt about her competence to give unsworn evidence.
55. CC was quite understandably emotional at times when speaking about what her father had done to her. I am sure that her distress was entirely genuine. I found that her evidence flowed naturally and was unembellished. Her evidence remained consistent under cross-examination.


56. I am not troubled in the least by the fact that CC did not tell her mother or anyone else about what the accused did to her on 6 August 2023 until after the second incident on 19 August 2023. The accused was in a position of authority, and he told her not to tell anyone what he had done to her. The complaint to her mother on 19 August 2023 is not evidence of the truth of her complaints, but it does support her credibility.
57. CC's evidence about her father rubbing his penis on her vagina also finds some, albeit limited, support in the medical evidence.
58. Turning then to the defence case.
59. 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 has made me sure of his guilt.
60. The accused was unwavering in his denials of any sexual offending against his daughter. Nevertheless, I did not find him to be an impressive witness. He plainly lied about his whereabouts on the morning of 6 August 2023. I also find his evidence about his wife's supposed motive to have induced his daughter to make false allegations against him to be hopelessly contrived. When the suggestion was put to CM that she put her daughter up to lying because she was jealous of her husband's relationship with another woman, she rejected it out of hand. It is also wholly implausible that an innocent child could sustain such a tissue of lies about her father's repeated sexual offending against her.
61. Having observed her closely in the witness box, my impression of CM is that she is a caring mother. I am sure that she would not have put her daughter through the trauma of a medical examination and criminal trial in the knowledge that she herself had induced her daughter to make false allegations. I accept CM's evidence that, when CC opened up to her, she could not believe that the accused would do such a thing to his daughter.

Plainly, CM harboured some resentment against the accused. This is hardly uncommon in long-term relationships. Perhaps even more so where one party is dependant on the other and has limited options to escape an unsatisfactory relationship. Be that as it may, being concerned for the wellbeing of her children, I am sure that CM would not have jeopardised her family by concocting *false* allegations.

62. I, therefore, have no hesitation in rejecting out of hand the accused's suggestion that CM put her daughter up to lying in Court about what the accused did to her.
63. Having rejected the defence case, I must return to the central issue of whether I accept CC as a truthful and reliable witness.
64. I find her account of what her father did to her on 6 August 2023 and 19 August 2023 to be wholly plausible. The accused's offending on 19 August 2023 might appear to be unbelievably brazen in light of the fact that his wife lay in the adjacent room, and there were no bedroom doors, but it is the sad experience of the courts that this type of brazen sexual offending is all too common.
65. I am sure that CC gave truthful and reliable evidence about the things the accused did to her. Those things were unquestionably unlawful and contrary to the ordinary standards of respectable people in this community. They were sexual and grossly indecent.
66. Accordingly, the Court finds the accused guilty and convicts him on counts 1,2,3,6 and 7.
67. In reaching my verdicts in this case, I have not considered it necessary to resolve the issue whether the accused attempted to interfere with witnesses. The suggestion by the prosecution that he did attempt to interfere with witnesses, and the fact that the accused breached his conditions of bail, have played no part in my deliberations.

68. 30 days to appeal to the Court of Appeal.




.....
Hon. Mr. Justice Burney

At Labasa

24 October 2025

Solicitors

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