

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 122 OF 2023

BETWEEN : **STATE**

AND : **RATU PENI VULACA DAUNIBAU**

Counsel : **Ms K Dugan for the State**
Mr I Emasi for the Accused

Date of Ruling : **20 March 2026**

RULING

Introduction

- [1] This is an application by the State for an order that the respondent, Ratu Peni Vulaca Daunibau, submit to the taking of a buccal swab for the purpose of DNA analysis in a pending rape proceeding, Criminal Case No. HAC 122 of 2025.
- [2] The respondent is charged with one count of rape contrary to s 207(1) and (2)(a) of the Crimes Act 2009. It is alleged that he penetrated the vagina of the complainant, with his penis without her consent on an unknown date between 26 August 2024 and 6 September 2024.
- [3] The complainant subsequently gave birth to a child and alleges that the respondent is the child's father. A birth certificate for the child, Ratu Isikeli Milamila Daunibau, has been exhibited in the affidavit material.

- [4] The State seeks an order for a buccal swab from the respondent so that his DNA profile can be compared with the DNA profile of the child for the purpose of a paternity test. The application is brought under s 11(3) of the Constitution of the Republic of Fiji 2013 and relies on the inherent jurisdiction of the High Court.

The Application and Evidence

- [5] The application is supported by the affidavit of WPC 7307 Avolonia, the investigating officer, sworn in October 2025.
- [6] The officer explains that the buccal swab is required to obtain a DNA sample from the respondent which can be scientifically compared with the DNA of the child to establish or exclude biological paternity, and that this evidence is important to confirm or refute the complainant's allegation and assist the court in determining the facts.
- [7] She further states that the use of DNA evidence will help secure a fair trial by providing objective scientific evidence rather than relying solely on allegations.
- [8] The State's written submissions emphasise that there is no specific statutory provision in the Criminal Procedure Act or other criminal procedure legislation for the taking of bodily samples for DNA analysis, and that the application is therefore made pursuant to s 11(3) of the Constitution and the court's inherent jurisdiction.
- [9] The State relies on my brother Hamza J's ruling in *State v Kumar* FJHC 652; HAM 65 of 2022 and on *State v Yalayala* FJHC 208; HAM 25 of 2025, where the High Court granted similar orders for the taking of bodily samples for DNA analysis.

The Respondent's Opposition

- [10] The respondent opposes the application and has filed written submissions.

[11] The respondent contends, in essence, that:

- he denies the allegations made in the investigating officer's affidavit;
- he has refused to provide a DNA reference sample for testing;
- compelling him to provide a DNA sample would infringe his constitutional rights under ss 11, 12 and 14 of the Constitution; and
- the State ought to have obtained this evidence during the investigation, before charging him, and cannot now cure any deficiency in its case by compelling him to assist in obtaining further evidence.

[12] The respondent relies on:

- s 11(3) (freedom from scientific or medical treatment or procedures without an order of the court or informed consent);
- s 12 (freedom from unreasonable search and seizure); and
- s 14(2), including the rights to be presumed innocent, to remain silent, and not to be compelled to give self-incriminating evidence.

[13] The respondent also refers to the Prosecution Handbook 2014 as to sufficiency of evidence, arguing that the decision to charge signifies that there was already sufficient evidence to proceed and that the State should not now rely on compulsion to strengthen its case.

[14] Heavy reliance is placed on earlier case law, including my decision in *State v Singh* FJHC 202; HAM 060.2008, decided under the 1997 Constitution, where the court held that in the absence of an express power a person could not be compelled to provide a DNA sample without consent.

[15] The respondent also engages with the subsequent jurisprudence, including *State v Vakadrano* FJHC 152, *State v Rokobulou* FJHC 1038 and *State v Isoof* FJHC 407,

and contends that DNA evidence falls within the scope of the right against self-incrimination.

Issues

[16] The issues that arise for determination are:

- (a) Whether, in the absence of specific statutory authority in the Criminal Procedure Act, this court has jurisdiction to order the respondent to submit to a buccal swab for DNA analysis.
- (b) If so, whether making such an order would impermissibly infringe the respondent's rights under ss 11, 12 and 14 of the Constitution, in particular the right to freedom from scientific or medical treatment without consent and the privilege against self-incrimination.
- (c) Whether, having regard to the facts of this case, it is in the interests of justice and proportionate to grant the order sought.

Applicable constitutional and legal framework

[17] Section 11(3) of the Constitution provides:

"Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian."

[18] Section 12 guarantees the right to be secure against unreasonable search or seizure, and allows search or seizure only under the authority of law.

[19] Section 14(2) provides, relevantly, that every person charged with an offence has the right:

- to be presumed innocent until proven guilty according to law;
- to remain silent, not to testify, and not to be compelled to give self-incriminating evidence; and
- not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it.

[20] Sections 100(3) and (4) of the Constitution confer on the High Court unlimited jurisdiction in civil and criminal proceedings and original jurisdiction in any matter arising under or involving the interpretation of the Constitution.

[21] Section 6(1) binds the legislative, executive and judicial branches of government to respect the Bill of Rights, and s 6(5) recognises that rights may be limited where necessary and prescribed or authorised by law.

[22] There is no enabling provision in the Criminal Procedure Act 2009 or other criminal procedure legislation for an application by the State to obtain a bodily sample from an accused person for DNA analysis in criminal proceedings. That position was carefully analysed by Hamza J in *State v Kumar* and is not in dispute before me.

[23] In comparative jurisdictions, such as Sri Lanka, New Zealand and the United Kingdom, specific statutory schemes exist for obtaining bodily samples for forensic purposes, but those provisions do not apply in Fiji and were referred to in *Kumar* only to highlight the legislative gap.

Analysis

Jurisdiction under s 11(3) and inherent powers

[24] In *State v Kumar*, Hamza J held that, notwithstanding the absence of specific statutory authority, the High Court may entertain an application by the State for

the taking of a bodily sample for DNA analysis pursuant to s 11(3) of the Constitution and the court's inherent jurisdiction.

[25] His Lordship analysed s 11(3) and concluded that the right to freedom from scientific or medical treatment or procedures is not absolute, because it is expressed as freedom from such procedures "without an order of the court or without ... informed consent".

[26] On that reasoning, the Constitution itself contemplates two lawful bases upon which a person may be subjected to a scientific or medical procedure: (a) with his or her informed consent; or (b) pursuant to an order of the court.

[27] In *Kumar*, the High Court concluded that the State could seek such an order from the High Court, and that the High Court, as a superior court of record with inherent jurisdiction, had power to make ancillary orders necessary to ensure the proper administration of justice, including facilitating forensic evidence-gathering in an appropriate case.

[28] The same approach was adopted in *State v Yalayala*, where an order for a bodily sample was granted under s 11(3).

[29] I respectfully agree with the reasoning in *Kumar* and *Yalayala*. Section 11(3) of the 2013 Constitution is materially different from s 25(2) of the 1997 Constitution that I considered in *State v Singh* (2008). Under the 1997 Constitution, there was no express reference to an "order of the court" in the freedom from scientific or medical treatment, and I held that compulsion was not available absent consent.

[30] The inclusion of the phrase "without an order of the court" in s 11(3) is a deliberate drafting change. It signals that in defined circumstances, and subject to

constitutional safeguards, a court order may authorise a scientific or medical procedure that an individual declines to consent to.

[31] It follows that *Singh*, which turned on the absence of a court-order pathway in the 1997 Constitution, cannot be applied mechanistically under the 2013 Constitution. The constitutional text has changed, and this court must give effect to that change.

[32] I therefore hold that this court has jurisdiction, under s 11(3) and its inherent powers, to entertain and, where appropriate, grant an application for the taking of a buccal swab for DNA analysis.

Self-Incrimination and the Nature of DNA Evidence

[33] The respondent submits that compelling him to provide a buccal swab would infringe his right to remain silent and not to be compelled to give self-incriminating evidence under s 14(2)(j).

[34] The question whether obtaining bodily samples engages the privilege against self-incrimination has generated differing views in our jurisprudence, as the respondent's submissions acknowledge.

[35] In *Vakdranu*, Rajasinghe J held that DNA evidence fell within the protection against self-incrimination, relying on Canadian authority such as *R v Stillman* (1997) 1 SCR 607.

[36] In *Rokobulou* [2020] FJHC 1030, Perera J disagreed and concluded that a buccal swab did not infringe the right against self-incrimination because the accused was not being compelled to make a testimonial communication or confession; rather, he was being required to provide a bodily sample which might inculpate or exculpate him depending on the outcome of the testing.

- [37] In *Isoof* [2021] FJHC 407, Rajasinghe J reiterated his view that DNA evidence falls within the concept of self-incrimination, while clarifying the limited extent to which *Stillman* had been revised by subsequent Canadian cases such as *R v Grant* (2009) 2 SCR 535.
- [38] My own decision in *Singh*, decided under the 1997 Constitution, proceeded primarily on the text of s 25(2) and did not finally decide the scope of self-incrimination in relation to DNA under the present Constitution, although I observed that compelling DNA testing after charge may raise self-incrimination concerns.
- [39] Section 14(2)(j) is concerned, in its language and structure, with the accused's right to remain silent, not to testify, and not to be compelled to "give self-incriminating evidence". This right is classically associated with testimonial or communicative acts by the accused.
- [40] A buccal swab is a minimally invasive method of collecting epithelial cells from the inner cheek using a swab. It does not require the respondent to speak, write, or otherwise communicate information from his mind.
- [41] In *Kumar*, Hamza J held that the taking of a buccal swab for DNA analysis did not infringe the respondent's right against self-incrimination. Among other reasons, his Lordship noted that the DNA result might equally assist the defence and that the act of providing a sample is not, in itself, a confession or admission of guilt.
- [42] I am persuaded by that reasoning. In my view, the privilege against self-incrimination under s 14(2)(j) protects the accused from being compelled to give testimonial or communicative evidence, but it does not extend to the provision of identifying or physical evidence such as fingerprints, photographs, or

non-intrusive bodily samples, provided that such procedures are conducted lawfully and proportionately.

- [43] For these reasons, I find that an order for a buccal swab does not, in itself, infringe the respondent's right under s 14(2)(j), though the manner of obtaining and using such evidence must still comply with constitutional standards, including the right to a fair trial.

Timing of the Application and Investigation Sufficiency

- [44] The respondent contends that because he has already been charged, the State must be taken to have sufficient evidence to proceed and should not now be allowed to compel him to strengthen its case. He relies in this regard on the Prosecution Handbook and on my observations in Singh.
- [45] The Prosecution Handbook is a policy document guiding prosecutorial decision-making on sufficiency of evidence. It does not confer rights on an accused, nor does it limit the court's constitutional powers under s 11(3).
- [46] The decision to charge does not freeze the evidential landscape. Investigations may continue after charge, and additional evidence – whether forensic, documentary, or testimonial – may be obtained by lawful means, including by court order where the Constitution permits.
- [47] In Singh, the concern was that, under the 1997 Constitution, there was no constitutional or statutory authority to compel a bodily sample; therefore, compelling DNA after charge risked violating the accused's rights. The present Constitution, as noted, expressly provides for court-ordered scientific procedures.
- [48] Provided that the order sought is necessary, proportionate, and consistent with fair-trial rights, the mere fact that the respondent has already been charged is not, in my view, a bar to the present application.

Proportionality, Necessity and Fairness

- [49] Section 11(3) must be read in the broader context of the Bill of Rights and the court's duty to ensure a fair trial for both the accused and the State.
- [50] The offence alleged is serious. Rape carries heavy penalties and substantial social stigma. Establishing the truth is therefore of high public importance.
- [51] The evidence sought – a buccal swab for paternity testing – is directly relevant to a central factual issue: whether the respondent is the father of the complainant's child conceived around the period of the alleged offending.
- [52] If the DNA analysis establishes that the respondent is not the biological father, that fact may significantly assist his defence. If it establishes that he is the father, that fact may corroborate the complainant's account and form part of the evidential matrix at trial. Either way, the evidence is potentially exculpatory as well as inculpatory.
- [53] A buccal swab is minimally invasive and physically harmless. It does not involve pain, anaesthesia, or significant risk; it respects the respondent's bodily integrity to a high degree while allowing the extraction of genetic material for analysis.
- [54] There is no suggestion on the material before me that the procedure would endanger the respondent's health, dignity or security of the person, nor that it would amount to cruel, inhumane or degrading treatment under s 11(1) or (2).
- [55] There is also no alternative, less intrusive means of obtaining the respondent's DNA profile for comparison in this case. The State cannot obtain an adequate reference sample without his cooperation or a court order.

- [56] In Kumar, the High Court emphasised that the absence of specific legislation should not preclude the court, in an appropriate case, from making an order that is necessary for the proper administration of justice, particularly where the procedure is minimally invasive and the evidence sought is of high probative value.
- [57] Balancing the respondent's Constitutional rights under ss 11, 12 and 14 against the interests of justice, I am satisfied that the order sought is a proportionate and necessary limitation authorised by the Constitution itself under s 11(3) and consistent with s 6(5).
- [58] Any concern about the use of the resultant DNA evidence at trial, including issues of admissibility and weight, can be addressed by the trial judge in light of s 14(2)(k) and the general law of evidence.

Conclusion

- [59] For these reasons, I am satisfied that:
- (a) this court has jurisdiction under s 11(3) of the Constitution and its inherent powers to order the respondent to submit to a buccal swab for DNA analysis;
 - (b) such an order does not violate the respondent's privilege against self-incrimination under s 14(2)(j), properly construed; and
 - (c) in the circumstances of this case, the order sought is necessary, proportionate, and in the interests of justice, and it will promote rather than undermine the respondent's right to a fair trial.

Orders

- [60] The court accordingly makes the following orders:

- a) Pursuant to s 11(3) of the Constitution of the Republic of Fiji 2013, the respondent, Ratu Peni Vulaca Daunibau, is ordered to submit to the taking of a buccal swab by a suitably qualified medical practitioner or authorised forensic officer for the purpose of obtaining a DNA sample.
- b) The buccal swab shall be taken at a time and place to be arranged by the Fiji Police Force and the Office of the Director of Public Prosecutions in consultation with the respondent's counsel, and in a manner that is safe, hygienic, and respectful of the respondent's dignity.
- c) The DNA sample obtained from the respondent shall be used solely for the purpose of comparison with the DNA profile of the child of the complainant, for paternity testing in relation to Criminal Case No. HAC 122 of 2025, and for no other purpose without further order of the court.
- d) The results of the DNA analysis shall be disclosed to both the State and the respondent's counsel forthwith upon receipt, and may be tendered at trial subject to the rulings of the trial judge on admissibility and weight.



.....

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused