

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

Criminal Case No. HAC 22 of 2024

THE STATE

-v-

JEMESA TAGIVE

**Counsel: Ms E Thaggard for the State
Ms M Besetimoala for the Accused**

Date of Trial: 15, 16, 18, 19 December 2025

Date of Judgment: 20 February 2026

JUDGMENT

Introduction

1. The accused pleaded not guilty to a single count of rape of a child under the age of 13 years, contrary to 207(1) and (2)(a) and (3) of the Crimes Act 2009, the particulars being that, on 3 October 2018, at Banikea village, Bua, he inserted his penis into the vagina of the complainant. To protect her identity, I shall refer to the complainant as CC in this Judgment.
2. The procedural background has not been straightforward, and the trial gave rise to three principal challenges.

3. Firstly, the accused is deaf and mute. The only person capable of communicating with him is his elder sister. Secondly, this is a historic case. Whilst the Information was filed on 10 April 2024, the alleged offending took place as long ago as 3 October 2018. Thirdly, CC was aged 14 years at trial, and was only 7 years of age at the time of the alleged offending.
4. In order to ensure a fair trial for the accused, and to meet the first challenge, the Court was careful to confirm that defence counsel had taken full instructions from the accused. Also, the accused's sister was present throughout the trial to facilitate communications.
5. The second and third challenges are addressed in the legal directions that I give to myself below.

The prosecution case

6. CC was 14 years of age at trial. She gave sworn evidence from the child-friendly room at the Labasa Court Complex. Before testifying, CC had refreshed her memory from the witness statement that she made in 2018.
7. CC said that, in 2018, she was living together with her parents and siblings in the family home in Banikea village. She was 7 years old in 2018.
8. At around 7pm on the evening of 3 October 2018, she was at home sleeping beside her 8-year-old brother. Her mum had gone out to weave mats and her dad was out drinking grog. Jemesa Tagive came to their bed. Jemesa is her uncle, and she has known him since she was small. He also lives in the village. She would see him on a daily basis. When he came to their bed, she was able to see his face by the light of a small kerosene lantern placed next to the bed.
9. Jemesa took off her skirt and her panty and lay on her stomach. He put his penis inside her vagina. She felt pain. She saw his face close up for one minute as he did this. She called out to her brother, but he was sleeping. Jemesa signalled for her to be quiet. CC demonstrated how he covered her

mouth with his hand. After he took his penis out of her vagina, Jemesa put on his clothes and left.

10. The very next morning, CC told her mum what Jemesa did to her. She told her that he pulled off her blanket, removed her clothes and put his penis into her vagina.
11. When asked whether Jemesa was in the courtroom, CC indicated that he was the accused in the dock.
12. In cross-examination, CC confirmed that she was sleeping in the same bed as her brother on the night of 3 October 2018. She agreed that the small lantern was the only source of light and that it was not very bright inside the house. She also agreed that what happened to her happened very fast. She woke up when her blanket was pulled off her. When CC was asked whether it was possible that it was not Jemesa that she saw that night, she answered that it was Jemesa. When it was suggested to CC that, because the light was not very bright, she had not seen his face clearly, she answered, *“My Lord, I saw the person who came that day, it was Jemesa”*.
13. In re-examination, CC said that the light was bright enough for her to see faces.
14. CC’s mother (“CM”) said that CC is the youngest of her four children.
15. On the evening of 3 October 2018, she was at another house, weaving mats. Her husband had gone to drink grog. CC was sleeping at home with her brother.
16. On the morning of 4 October 2018, CC told her that the accused had come to her, removed her clothes and put his penis into her vagina.
17. On 4 October 2018, after CC told her this, she took her to the police. After reporting to the police, CC was taken to the hospital and seen by a doctor. She was informed that there was a tear in CC’s vagina.
18. The accused is her husband’s first cousin.

19. In answer to my questions, CM said that she had told her husband and the village headman about what CC had told her. She reported the matter at Nabouwalu Police Station, which is really far from the village. She had called the police, and a police vehicle came the same day and took them to the police station.
20. CC's father ("CF") testified that he was drinking grog at Pita's house at around 5pm on 3 October 2018. He knows three people by the name of Jemese Tagive. One of them is the accused's father, who has since passed away. CF's younger brother is named Jemese Tagive. The accused is the third Jemese Tagive. He is CF's first cousin.
21. The grog session started at around 4.30pm and finished around 10pm. The accused was at the grog session, but he left around 8pm and did not return.
22. The following day, CM and CC went to Nakadrudru. They went to the police and to hospital. The police came to the village and recorded his witness statement one or two weeks later. They recorded statements from CM and CC at the same time.
23. In cross-examination, CF agreed that he had been drinking grog at Tomasi Vula's house, and that Tomasi Vula, the three Jemesa Tagives, Inoke Ravisa and Eparama Raraumala were all present at the grog session. The accused had joined the session at around 6pm. When it was suggested that the accused had stayed until 10pm, CF maintained that he had finished off early. He left before 10pm. When I sought to clarify what time the accused had left the session, CF explained the problem was that these events were a long time ago. He cannot recall precisely when the accused left the session.
24. In re-examination, CF said that the accused joined the session at around 6pm and stayed for about 2 hours.
25. On 10 October 2018, CC was medically examined by Dr Nikotimo Bakani at Medical Services Pacific, Labasa. He completed a Medical Examination Form, which was tendered by agreement as PE-1. CC had suffered a blunt

force penetrative injury to her genitalia, causing hymenal laceration with swelling.

26. Sergeant Aminiasi Bola was the initial Investigating Officer in this case. He was serving at Nabouwalu Police Station in 2018. On 9 October 2018, he received a report from the woman heading a Women's Community Network in Banikea Village that a young girl had been raped in the village. He directed a police vehicle to go to the village. The complainant and her mother were brought to the police station on 9 October 2018. Sgt Bola was shown the original investigation diary in which he had made manuscript entries. The complainant and her mother were brought into the station at 18.30hrs. The following day, they were taken to the Sexual Offences Unit in Labasa and for medical examination at MSP. That evening, the complainant and her mother were returned to the village and witness statements were recorded. Sgt Bola said that this was a problematic investigation because of the suspect's disabilities. He was not interviewed under caution until 5 September 2022. The Investigation Diary was tendered as PE-2.
27. In cross-examination, Sgt Bola confirmed that if there had been a report made prior to 9 October 2018 it would have been actioned immediately.
28. At the close of the prosecution case, defence counsel and the accused's sister confirmed that the accused had been explained his options. He elected not to give evidence and to call a single alibi witness.

Defence evidence

29. Mr Jemesa Tagive is a 42-year-old farmer. He has lived in Banikea Village for 20 years.
30. He is CC's uncle. Her father is his elder brother. The accused is his first cousin. His father is the accused's father's elder brother.
31. He testified that he was drinking grog at Tomasi Vula's house on 3 October 2018. The session started at around 6pm and finished at around 10pm. Also present at the session were Jemesa Tagive (accused's father), Inoke Ravisa,

Tomasi Vula, Eparama Rauraumala, Eremasi Rakavu, and the accused. Nobody had left the session early, save for short comfort breaks.

32. In cross-examination, Mr Tagive confirmed that there was a total of 8 people at the grog session. He said that he drinks grog 6 days a week between the hours of 6pm to 10pm, not always with the same group of people. He remembers this particular grog session because he had come to know of the serious allegations against the accused a few days after that session. He was the village headman at that time, and had been told about the allegation by the accused's parents. They had come to him to accompany them to do the traditional forgiveness to CC's parents.
33. When it was suggested to him that he was lying because he did not want the accused to go to prison, Mr Tagive replied that he would not lie.
34. In re-examination, Mr Tagive explained that the '*matanigasau*' was done because of the rumours in the village.

Closing submissions

35. I heard closing speeches on 19 December 2025, and I have also considered the helpful written submissions filed by both parties.
36. Ms Thaggard made the point that, given that CC was 7 years old at the time of the alleged offending, and the medical evidence supporting that she had suffered a penetrative injury to her vagina, the only issue for the Court is whether I am sure that it was the accused who penetrated CC's vagina with his penis.
37. The defence does not suggest that CC has fabricated a rape allegation against the accused. Rather, the defence is mistaken identity.
38. In this regard, Ms Thaggard submitted that the accused was well known to CC, she had observed him by sufficient light from the bedside lantern at close quarters for about one minute. CC was unshaken in cross-examination, and

was adamant that she saw his face and that it was the accused who put his penis inside her vagina.

39. Ms Thaggard submitted that the recent complaint to her mother the very next morning supports CC's credibility. The inconsistency between CM's evidence about reporting the matter to police on 4 October 2018 and Sgt Bola's evidence about when and how the matter was reported to him may be explained by the effect of the long delay on CM's memory. In any event, Ms Thaggard argues that this discrepancy does not go to the heart of the prosecution case.
40. Ms Thaggard argues forcefully that the alibi must be rejected. The alibi witness could not possibly have kept tabs on the accused throughout the grog session. He has an interest in maintaining peace within his family. Also, the alibi is undermined by the evidence of CF that the accused left the grog session early and did not return. Most importantly, CC was positive that it was the accused who raped her on that day.
41. In short, CC is a truthful and reliable witness whose evidence alone is sufficient to prove the prosecution case.
42. In her closing speech, Ms Besetimoala submitted that the identification evidence is weak. CC had just awoken, the lighting in the room was dim, and the incident happened very fast. She argued that, in these circumstances, CC's identification of the accused may be mistaken.
43. Ms Besetimoala submitted that Mr Tagave gave reliable evidence in support of the accused's alibi. The incident is embedded in his memory because he was the village headman at that time. By way of contrast, CF accepted that it was difficult for him to recall the grog session owing to the lapse of time.
44. Ms Besetimoala correctly reminded me that it is for the prosecution to disprove the alibi to the criminal standard and that, even if I were to reject the alibi, it would not follow that the accused is guilty by reason of that rejection alone.

45. Ms Besetimoala argued that the prosecution is undermined by the delay in the matter being reported to the police. There is a conflict between CM's evidence that the report was made on 4 October 2018 and Sgt Bola's evidence that he received the report from the woman heading a Women's Community Network in Banikea Village on 9 October 2018.
46. As for the '*matanigasau*', Ms Besetimoala explained that this cultural practice is directed at ensuring that the family dynamic is not disturbed in the village setting. It is not done as an admission of guilt *per se*.

Legal Directions/warnings

47. 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.
48. The issue I must determine boils down to whether I am sure that the complainant is a truthful and reliable witness whose evidence makes me sure that the accused is guilty as charged.
49. CC is a child. She was around 7 years old at the time of the alleged offending, and 14 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.
50. Because CC was 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.

51. 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.
52. 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.
53. These things are relevant to a child's level of understanding rather than to their credibility.
54. None of these things mean that CC is or is not reliable: that is a matter for my judgement.
55. Since the accused relies on an 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.
56. The central issue in this case is identification. The defence say that CC's identification of the accused is mistaken. They highlight certain weaknesses in the identification evidence. The prosecution, on the other hand, argue that the quality of the identification evidence is good.
57. Experience has shown that any witness who has identified a person can be mistaken. It is, therefore, appropriate that I warn myself that there is a need

for caution to avoid the risk of injustice. A witness who is honest and convinced in their own mind may be wrong. A witness who is convincing may be wrong. A witness who is able to recognise the accused, even when the witness knows the accused very well, may be wrong.

58. In this case, CC said that she observed the accused's face for one minute at close distance. I keep in mind that a child's perception of time is different to that of an adult. The accused was well known to her and she saw him on a daily basis. I keep in mind also that the lighting was not that bright, although CC said that it was bright enough for her to see the accused's face. A potential weakness in CC's evidence is that the incident was relatively fast-moving and, no doubt, it would have been a shocking incident for a young child.
59. 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.
60. 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.
61. Finally, the potential difficulties arising from long delay became apparent during the trial. I bear in mind that the passage of time is likely to have affected the memory of each of the witnesses about exactly what happened all those years ago.
62. The accused may have been put at a disadvantage by not being able to remember details now that would have helped him. I am aware that at least one of those present at the grog session has since died.

63. I take the long delay into account in the accused's favour when deciding whether or not the prosecution have proved that he is guilty.

Analysis and decision

64. Despite the challenges presented by the trial, ultimately the issue I must determine is relatively straightforward. Am I sure that the accused penetrated CC's vagina with his penis on 3 October 2018?

65. As mentioned above, the central issue in this case is the identity of the person who penetrated CC with his penis on 3 October 2018.

66. Notwithstanding the long delay and her tender years at the time of her rape, I am satisfied so that I am sure that CC has reliably and truthfully identified the accused as the man who raped her.

67. The accused was well known to CC. She observed his face from a short distance as he raped her. It was not a fleeting glance. I am satisfied that the bedside lantern provided adequate light for CC to see the accused's face.

68. CC's complaint to her mother the very next morning supports the consistency of her position that it was the accused who raped her. In saying this, I acknowledge that her complaint does not support the correctness of her identification of the accused – only that she has been consistent throughout that it was the accused who raped her.

69. Similarly, the rumours giving rise to the '*matanigasau*' do not support the correctness of her identification. I accept that guilt cannot be inferred from a traditional apology. I leave that out of the equation entirely in my deliberations.

70. I accept Sgt Bola's evidence that he first received a report of child rape in this matter on 9 October 2018. It seems to me that CM is likely mistaken in her recollection of having reported the matter on 4 October 2018. In my view, nothing turns on this discrepancy. Certainly, it does not undermine CC's clear

and cogent account of the accused having raped her on the evening of 3 October 2018.

71. Since I am sure that CC's evidence of identification is reliable, it follows that the accused's alibi is false. I add only that it seems to me to be inherently unlikely that, at this distance in time, Mr Tagave could reliably recall that the accused did not leave a grog session on the evening of 3 October 2018. It was his evidence that he drinks grog six days a week, year after year. It has been my experience that one grog session is very much like the next.
72. For the reasons given, I am sure that the accused penetrated CC's vagina with his penis on 3 October 2018. I find him guilty as charged and convict him accordingly.
73. 30 days to appeal to the Court of Appeal.



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

Hon. Mr Justice Burney

At Labasa

20 February 2026

Solicitors

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