

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 219 of 2020

STATE

vs.

KAVENI MOCEICA

Counsel: Ms. S. Tivao for the State
Mr. T. Varinava for the Accused

Date of Hearing: 02nd to 06th May 2022

Date of Closing Submission: 4th May 2022

Date of Judgment: 11th May 2022

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "M.T")

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 25th September 2020:

COUNT ONE

Statement of Offence

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

Particulars of Offence

KAVENI MOCEICA, between 1st of January 2017 and the 31st of December 2017 at Nadali Village, Nausori, in the Eastern Division, penetrated the vagina of **M.T**, a child under the age 13 years, with his tongue.

COUNT TWO

Statement of Offence

ATTEMPTED RAPE: contrary to Section 208 of the Crimes Act, 2009.

Particulars of Offence

KAVENI MOCEICA, between 1st of January 2017 and the 31st of December 2017 at Nadali Village, Nausori, in the Eastern Division, attempted to penetrate the anus of **M.T**, a child under the age 13 years.

COUNT THREE

Statement of Offence

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

Particulars of Offence

KAVENI MOCEICA, between 1st of January 2018 and the 31st of December 2018 at Nadali Village, Nausori, in the Eastern Division, penetrated the anus of **M.T**, a child under the age 13 years, with his penis.

COUNT FOUR

Statement of Offence

ATTEMPTED RAPE: contrary to Section 208 of the Crimes Act, 2009.

Particulars of Offence

KAVENI MOCEICA, between 1st of January 2019 and the 31st of December 2019 at Nadali Village, Nausori, in the Eastern Division, attempted to penetrate the anus of

M.T, a child under the age 13 years.

COUNT FIVE

Statement of Offence

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

Particulars of Offence

KAVENI MOCEICA, between 1st of January 2019 and the 31st of December 2019 at Nadali Village, Nausori, in the Eastern Division, penetrated the vagina of **M.T**, a child under the age 13 years, with his tongue.

COUNT SIX

Statement of Offence

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

Particulars of Offence

KAVENI MOCEICA, between 3rd of April 2020 and the 30th of June 2020 at Nadali Village, Nausori, in the Eastern Division, penetrated the anus of **M.T**, a child under the age 13 years, with his finger.

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

KAVENI MOCEICA, between 3rd of April 2020 and the 30th of June 2020 at Nadali Village, Nausori, in the Eastern Division, had carnal knowledge of **M.T**, a child under the age 13 years.

COUNT EIGHT

Statement of Offence

RAPE: contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act, 2009.

Particulars of Offence

KAVENI MOCEICA, between 3rd of April 2020 and the 30th of June 2020 at Nadali Village, Nausori, in the Eastern Division, penetrated the mouth of **M.T**, a child under the age 13 years, with his penis.

2. The accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rest 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. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredient or on the of evidence or led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. As the Accused has given evidence in this case if this court accepts his evidence or is unable to reject or accept his evidence then too the accused is entitled to finding in his favour.
3. For the accused to be found guilty of the rape counts 1 and 5 in the present case based on sub sections 2(b) and (3) of Section 207 that in addition to the date stated in the respective count the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) penetrated the complainant's vulva with his tongue,
 - (iii) complainant is less than 13 years of age'

The slightest penetration of the complainant's vulva by the accused's tongue is sufficient to satisfy penetration.

4. For the accused to be found guilty of the 2nd and the 4th counts of attempted rape in the present case based on sub sections 208, the prosecution must prove beyond reasonable doubt, that the accused did everything to,

- (a) penetrated the complainant's anus with his penis,
- (b) complainant is less than 13 years of age,

And the accused was not successful in so penetrating the anus due to an intervening cause or a reason beyond his control penetration.

5. For the accused to be found guilty of the 6th count of rape in the present case based on sub sections 2(b) and (3), the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused
- (ii) penetrated the complainant's anus with his finer,
- (iii) complainant is less than 13 years of age'

The slightest penetration of the complainant's anus by the accused's finer is sufficient to satisfy penetration.

6. For the accused to be found guilty of the 7th count of rape in the present case based on sub sections 2(b) and (3) of Section 207 the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused
- (ii) penetrated the complainant's vulva with his penis,
- (iii) complainant is less than 13 years of age'

The slightest penetration of the complainant's vulva by the accused's penis is sufficient to satisfy penetration.

7. For the accused to be found guilty of the 8th count of rape in the present case based on sub sections 2(b) and (3), of Section 207 the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused
- (ii) penetrated the complainant's mouth with his penis,

(iii) complainant is less than 13 years of age'

The slightest penetration of the complainant's mouth by the accused's penis is sufficient to satisfy penetration.

Summary of Evidence

8. The Prosecution led the evidence of the complainant M.T and her mother Litiana Ranadi, Doctor Lusana Burua and Sergeant Patricia Liga. At the conclusion of the prosecution case the accused was called upon to state his defence and the accused gave evidence and called Miriama Marama to give evidence on his behalf. That being the case for both parties counsel made submissions and the matter was fixed for judgment.
9. The following facts are admitted,
 - a. The name of the person charged is Kaveni Naiteqe Moceica ["Kaveni"].
 - b. Kaveni was born on 28 October 1965 and was 52 years old in 2017.
 - c. The name of the complainant is M.T
 - d. M.T was born on 22 March 2009 and was 8 years old in 2017. *The birth certificate of the complainant is hereby tendered by consent.*
 - e. M.T's biological mother's name is Litiana Ranadi ["Litiana"]. Litiana's older sister is Miriama Marama ["Marama"] and brother I Senivalati Kuruduadua ["Senivalati"].
 - f. Miriama Marama has daughters named Arieta Verevinaka and Akeneta.
 - g. Miriama, Arieta and Akeneta also refer to Kaveni as "Ratu".
 - h. Miriama Marama and Kaveni were in a de-facto relationship between 2017 and 2020.
 - i. M.T was looked after by Miriama Marama and Kaveni at Nadali, Nausori from 2017 to 2020
10. The eight charges are in respect acts alleged to have been committed during 3 ½ years from 1st January 2017 to 30th June 2020. The accused is the de facto partner of Miriama who is the aunt of M.T. M.T's mother is Litiana Ranadi. Litiana and Marama are sisters. M.T had been handed over to Marama to be looked after and brought up as Litiana and her husband were unemployed. M.T has gone to Marama when she was in year 2. Marama and the accused Kaveni had been in this defecto relationship for 19 years as at the date of this trial. These being the undisputed common facts now I will summarize the prosecution evidence.

Prosecution Evidence

11. According to M.T she had gone to live with Marama and Marama had 3 children by the accused and they have been living in Nadali. M.T's brother also has come to live with them somewhere around that time. She appears to have gone there around the year 2016 when she was in year 2. According to her the accused Kaveni whom she also calls Ratu too has stayed with them at some point of time and he comes to Nadali when her aunty goes to work. Her evidence is that he does come there on certain occasions. Her evidence covered various happenings during the 3 ½ years from 2017 to June 2020. She refers to each period or the relevant year with reference to the class she was studying at the relevant time. She had been in class 3 in 2017, class 4 in 2018, class 5 in 2019 and class 6 in 2020.
12. Whilst in class 3 she says that the accused use to come to their house and has touched her breast, buttocks and gets her to lie down and then fondles her vagina and the anus. Then the accused licks her anus, gets her to touch his penis and also he licks her vagina. Then he apparently uses oil on his penis until he ejaculates. She narrates that on one occasion that she was asked to fix an opening on the roof and when she climbed up the ledge the accused had moved under her and looked and when she got off, she was asked to undress and he watched her and then touched her right down to her thighs and licked her vagina and has penetrated her vagina with his tongue (count No.1). Then also he had tried to penetrate her anus with his penis (count No. 2).
13. Her evidence is that the accused licked her vagina and penetrated the vagina with his tongue whilst she was in class 3 and this he did continue to do throughout until she went to class 7 (count No. 5). Then she said that the Accused brigs oil applies on his penis and he penetrated it into her anus (count No. 3).
14. Then whilst in class 4 the accused had asked her to have sex with him when she disagreed he has threatened to hit her with "Sasa" broom. He also has got her to touch his penis and when refused as threatened to hit her. She describes that the accused used to give the phone to her step-sister to prevent them from coming to the room where she was abused by the accused.

15. Whilst in class 5 the accused is alleged to have continued doing the same things and also tried to kiss her in her mouth, touch her breast, vagina and had applied oil on her vagina and tried to insert his penis into her vagina and the anus (count No. 4). He also had made her suck his penis. The accused has during this time got her to lie down with her legs up and licked her vagina and the anus as described before. He also has made her watch phonographic videos and to do those things. She very clearly states that the accused did insert his penis into the vagina and anus while in class 5.

18. Whilst, in class 6, she had been subjected to the same sexual acts as done earlier and she specifically states that he used oil on her anus, vagina and tried to penetrate his penis into her anus and vagina. She states that sometimes there is bleeding from her anus when she goes to the toilet after he so inserted his penis. She gets a burning sensation when he licks her vagina. The accused had inserted his penis into her vagina (count No. 7) and also has got her to suck on his penis (count No.8). The accused puts his penis into her mouth and when the white thing comes from the penis and he stops when he ejaculates. Thus, if M.T's evidence is accepted her evidence covers and proves the Accused committing the acts as alleged by and described in counts 1, 2, 3, 4, 5, 7 and 8. However though at one point she states that the Accused did insert his finger to her anus but it does not correspond with the time frame mentioned in count 6. As such there is no evidence to prove count No.6.

19. In 2020 she had informed her mother Litiana Ranadi and sister of the abuse that was taking place. Her position is that she was waiting for a chance to meet her mother and her sister without the accused Kaveni or her aunt Marama. In 2020 she had got that opportunity and then told her mother that she was been abused sexually by Kaveni. The reasons for not disclosing for such a long time are fear instilled by the accused, threats and especially that she had not had the opportunity to tell her mother. She says that as her aunt Marama was stubborn and angry and could not tell her either.

20. In cross-examination it had been suggested that Kaveni was not there in Nadali, Nausori when she was in class 3, and the house in the photo was not there. She had denied this. She admits

that when she comes home after school Marama is sometimes there and she leaves for her work. Defence suggested that Kaveni never stayed with them in 2017. It was denied. She admits that Kaveni came to Nadali to help with the construction of the house and that he generally goes back after finishing the work but sometimes stays behind to drink grog with others who help in the construction. She admits that her mother and her step-father did come to reside with them in 2018 but they left shortly thereafter because Kaveni told them to leave. However, in 2020 during the lockdown Kaveni has been staying in their house at Nadali.

21. In cross examination she had told that the bleeding from the anus was very mild and not much and that he did not get onto her clothes or undergarments. Finally, the defence has suggested that what she is telling what was told by her mother and that she told the police what her mother told her to tell. The suggestion was that it's a lie instigated by the mother as she wanted to go back to her mother. M.T denied this and said all she told happened to her and what her mother told her was to tell the truth without being afraid.

Prosecution Witness 2 Litiana Ranadi

22. She narrated the circumstances under which M.T was given to Marama in 2017. After so handing over M.T she visits her and had one to Marama's house in the morning of 27/06/2020. Whilst in the house elder daughter of Marama wanted her to ask M.T as she had to say something for a long time. Then Litiana had inquired what it was. M.T had been hiding something and tears had rolled down when she inquired and then she had told that Kaveni had been doing adult things to her. She had told that Kaveni had been touching her, removing her clothes, licking her and looking under her skirt, showing indecent movies with naked girls and looking when she was bathing and used to give her money when he wanted her. Further she had told that Kaveni had threatened to burn her alive if she disclosed these.
23. Litiana said that she recalls that whenever she visits M.T, she wanted to go and live with Litiana but as Marama would say no she had not been taken. On that day when it was disclosed Kaveni and Marama have not been there and Litiana has waited for her sister to arrive then told her that this will be reported to the police. Having so informed she had gone to the police and made the complaint with M.T.

Cross-Examination

24. She admits that in 2017 she lived with her sister and that Kaveni did not reside in that house. In 2018 Kaveni had helped to complete the house. She also stated that Kaveni used to sometimes sleep-over at Nadali. It is admitted that Kaveni has told her and her husband to live this house and she was angry about it. The fact that looking under her skirt, showing indecent movies with naked girls and looking when she was bathing and used to give her money when he wanted her. Further she had told that Kaveni had threatened to burn her alive if she disclosed were not in the police statement was raised as omissions.

Medical Evidence

25. Doctor Lusana had examined M.T and observed a superficial tear on her labia minora (right side lower end). This break in the labia minora had been close to vaginal orifice on the inner lip. Then she had also observed that the hymen was perforated. She explained that in medical parlance this meant the hymen was not visible at all due to tissue damage and according to the history this may be due to sexual intercourse by inserting an erect penis. She expressed an opinion that this observation is consistent with the history. The object causing blunt trauma may be an erect penis.
26. At the end of her evidence in response to questions by court she stated that she did not observe any injuries around the anus. She explained further that if there was any old tear there should have been a scar but she had not seen any and she concluded by saying that she had looked for fresh injuries and if there was an injury there should have been a scar.
27. Finally the prosecution led the evidence of the crime scene officer Sergeant Patricia Liga who took the photographs of the house there was no cross examination.

Defence Case

28. The accused gave evidence and according to him the incident is as follows. He admits that he was in a long term de facto relationship with Miriama Marama had 3 daughters by her. He helped them financially and helped Miriama to complete and construct her house. He states that

he was not living at Nadali with Miriama until the lockdown in 2020. He had been living at his wife's place at Sawani. He said due to some issues he used to meet Miriama in the town then she admits helped her to construct the house at Nadali. During the construction to he comes in the morning leaves by 5 p.m., in the evening. He denies these allegations and takes up the position is that these false allegations were made to avenge the chasing of Litiana and her husband out of the house. According to him in 2016 his children were living at Auckland Street and M.T was also there and denies going to Nadali in 2016. However, he admits that Miriama and children lived in Nadali in 2017. However states that, as the leader of the tribe did not grant him permission he had not visited Nadali that year. He had denied the suggestions of sexually assaulting M.T. He admits asking M.T's mother Litiana and her husband to leave.

Defence Witness Miriama Marama

29. She was called on behalf of the accused and narrated the sequence of events from 2017 and admits moving to the new house in 2018. She had been employed and working on nightshifts. She admits that her sister's husband did help in the construction of the house and due to some differences with Litiana Kaveni told them to leave and they left. In 2020 due to the lockdown, she had been working from home and Kaveni had stayed with them in that house. She says that she did not know anything about this allegation and that M.T did not tell her anything. Further that in 2016 she was residing in Lokia when the parents went to their village, she went to reside at Auckland Street. She admits that the accused provides her with money and food and helps her to look after the children. She admits in 2018 she was working and the accused came to construct the house. Admits that the Accused used to help her with looking after the children. She denied the suggestion that she told M.T to close this case.

Evaluating the Evidence

30. I will first consider the Prosecution evidence. In evaluating M.T's evidence, I was concerned if she was randomly stating the things that the accused is alleged to have done to her during this 3 ½ year period. She is a small girl of 13 years and is narrating what she claims to have happened during the span of 3 ½ years when she was between 8-10 years of age. When you view her evidence in its totality and the narration in chronology there is a gradual increase in the sexual molestation as time progressed. In 2017 it is touching and getting her to remove her clothes

licking the vagina then then followed by trying to insert his penis to the anus and vagina then towards 2019 and to 2020 the accused has started kissing in the mouth inserting the penis into the vagina and then inserting the penis into her mouth and getting her to suck his penis. She does not just narrate that all such acts were committed throughout randomly. But she states that licking of the vagina/vulva and the anus continued throughout this period. Certainly, considering her age, the multiplicity of sexual acts, long term sexual abuse and the lapse of time she is not able to recall and narrate the sequence with precision. But she has to an appreciable level narrated the events in sequence. When considering the demeanour and the descriptions made it is not possible to have narrated these happenings so vividly and realistically unless she had actually experienced it happening to her.

31. There were no contradictions or omissions raised in her evidence.

Belated Complaint

32. It is a fact that M.T has not complained for almost 3 ½ years. There is certainly a delay. The reasons given by M.T are that she waited for an opportunity to meet her mother alone and in the absence of the Accused and Marama and also that she was threatened by the accused not to divulge. The delay per se will not make her evidence inadmissible but there is a serious duty on this court to consider what the reason for the delay is and if it is explained satisfactorily. It is settled law that recent complaint is relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter that goes to her credibility and reliability as a witness. **(Raj V The State 92014) FJSC 12: CAV 3 of 2014, 20 August 2014).**
33. The delay in making the complaint against the Accused for over two years, has to be considered in the circumstances of this case. M.T was in the house under the custody and care of Marama over whose family and house the Accused had tremendous control and influence to the extent he was able to virtually chase off M.T's mother from that house. A hapless girl of 8 to 10 years will naturally be under his influence and when subjected to sexual abuse will succumb and not have the nerve or the courage to open her mouth against the Accused. When M.T was giving evidence, I observed that she certainly does not appear

to have the character to stand against a tormentor of that nature. Justice Fernando (President of the Court of Appeal of Seychelles) in *Jean-Luc Louise v state* [2021] SCCA 72 considering a similar case of delay opined that,

“The matter of recent complaint only goes to the issue of credibility and consistency of the complaint....” and that, *“...Delay is a typical response of sexually abused children, as a result of confusion, denial, self-blame, embarrassment, powerlessness and overt and covert threats by offenders”*.

34. This is applicable to the present case too. M.T at a very young age being under care and custody of the accused and his de facto partner Marama require courage and to have emotional strength to reveal this even to her own mother. It appears that M.T had, with the passage of time and the gradual aggravation of the abuse gained courage and was psychologically prepared for the consequences of divulging and has told her mother. Thus, I accept her explanation for the delay. Her evidence is consistent with and is corroborated by medical evidence as evaluated later in paragraphs 36 onwards and considering the demeanour and deportment and the realistic nature of the evidence I accept M.T as truthful and reliable witness.

Why no one else saw and is it probable?

35. According to M.T all these acts of sexual abuse during the 3 ½ years has taken place in the house. This house is a small corrugated steel and wood house. In these circumstances is it probable that she would have been sexually abused without anyone else noticing? Her evidence was that the accused commits these acts generally in the room and usually on such occasions one of the daughters is gone to church and then the other is given the mobile phone by the accused to keep her in her room. There was no other evidence as led to the specific time and occasions as to when such acts have taken place. The accused did have free access to the house and undoubtedly he had the opportunity to come in when Marama may be at work or even when she is working from home when she was otherwise busy. Marama admits even when she worked from home it was the night shifts and that she rests during day. With the accused having free access it is certainly possible for him to select such times and occasions when others may not be around or attentive. There are two rooms in the house. There was also the occasion when

the accused stayed over in the house before the lock down. Therefore, I see no improbability in accused being able to pursue with his acts of abuse not been observed by the others. He certainly had the opportunity and the occasion to do so. However take for instance Marama, she is an adult and would have she not at least realized that something sinister was happening in the house? In this respect I made an observation in the evidence of Marama where she says that after being informed, she did inquire from the accused but that the accused did not respond. Litiana has informed Marama of the abuse before going to the police. In the normal course of event when she is informed of an incident of his nature especially between her adopted daughter and her partner you would expect her to be petrified, surprised and to react angrily and inquire and act in a certain manner. No such thing had happened. She seems to have merely asked about it and left it at that. She is in fact depended on the accused and continues with the de facto relationship. Considering these circumstances, it is extremely probable that Marama would have known that something was happening and had maintained blind eye or just ignored it and let it happen. Her passive inaction is highly probable in these circumstances as she had been dependent on the accused. Thus M.T's evidence and the position is probable and realistic.

Evaluation of Medical Evidence

36. Doctor Burua confirmed that the hymen of the girl M.T was perforated. The girl's hymen was completely absent and not seen. One of the reasons that may result in this condition is due to the insertion of an erect male penis. This is consistent with M.T's evidence of being abused by inserting the tongue, the finger and also the penis into her vagina during a prolonged time. The sum total of evidence is that during this 3 ½ years interference and intrusions by the way of penetrating her vagina had taken place. This is to that extend supported and corroborated by Doctor Burua. However at the end of Doctor Burua's evidence there was unexplained matter namely the bleeding from the anus which M.T said in evidence. The Doctor has not observed any injury in or around the anus. She has examined the external body down wards including the anus area and said that since no injury was observed she did not make any finding. Questioned further she said that superficial injuries may heal within a few days may be in less than a week. But she was of the view that if there was a tear or a superficial injury she should have observed a scar even after a lapse of time. This she said would have been possible due to the difference in colour. She said that such an injury would be visible for months or even years

as the child was growing. Thus according her evidence if there have been any injury to the anus she ought to have seen it but she had observed none. Is this inconsistent with the evidence of M.T. is what I have to consider. M.T. did say that on several occasions when the accused attempted to insert his penis into the anus it was painful and on occasions there was bleeding when she went to the toilet. However, in cross-examination when specifically questioned by the defence counsel as to whether blood got onto her clothing or undergarments her answer was that blood never got to her clothes or undergarments as the bleeding was minute. The relevant evidence of bleeding is as follows;

Ms. Tivao: And M.T you have mentioned that he tries to insert his penis into my anus. Was he able to insert his penis into your anus?

M.T.: He brings the oil and he uses the oil. He rubs it on my anus and rubs on his penis too and then he rubs it and he try to put into my anus.

Ms. Tivao: When he tries to put it in how do you feel?

M.T.: I feel pain.

M.T.: Okay can you tell us what happens when he tries to put his penis into your anus, what happened after that?

M.T.: At all this times when even I go to toilet and bath I feel uncomfortable, it's painful and my anus start to bleed.

and

Ms. Tivao: But M.T, you mentioned that he tries to put it in my vagina, was he successful and putting his penis in your vagina?

M.T.: When he tries to insert his penis into my anus, my anus starts to bleed.

and ,

Ms. Tivao: And so can you tell us, when he would insert his penis into your vagina?

M.T.: He used the oil, rubbed it onto his penis and try to penetrate my anus and when I go to the toilet, I bleed.

37. What does this mean? As far as I understand there had not been blood trickling down but some semblance of blood present when she goes to the toilet. This being so the injury caused to the anus does not appear to have been significant and it appears that the bleeding was noticed when she went to the toilet thus certainly it does not appear to have been an open external injury. If so, one would expect bleeding before going to the toilet and also to be on the clothing. Thus in

all probabilities this appears to be blood that had emanated from within the rectum internally and not from an external injury around the anus externally. If it was external there should have been blood on the undergarments but it was not so. Hence, the injury that led to bleeding in all probabilities appear to have been an internal injury, as such the Doctor will not be able to observe this type of injury by the external medical examination as done by her. As such there is no inconsistency between M.T's evidence and the medical evidence but is in harmony.

38. As narrated by the victim she had been subjected to numerous and various forms of vaginal penetration as well as interference into her anus and surrounding area. The doctor has observed a positive tear or an injury on the lower end of the labia minora which she explained to be towards the lower end close to vaginal orifice. Exhibit 2 the Medical Examination Form contains a diagram or a sketch of the said tear on the labia minora at page 5 of the said medical form. This clearly shows the said tear lower down towards the anal area. Therefore it is highly probable that she has sustained injuries that may have cause some bleeding. M.T is a small girl of 8 years when the alleged abuse had commenced. In the normal course of events there is a greater possibility that injuries may be caused at the early stages of abuse. These injuries are consistent with the events as narrated by MT.

Evaluating the Defence Evidence

39. The defence taken up by the accused a total denial and alleges that this is a false allegation to avenge the chasing away of Litiana from Marama's house in 2008. It was suggested that M.T made the complaint on the instigation of Litiana and MT said was that was made up and told to her by her mother. In short that the Accused has been falsely implicated by M.T at the instigation of Litiana.
40. Firstly, if Litiana was angry and annoyed of being ousted from the house in 2018 will she mark-time and wait for 1½ to 2 years until June 2020 for to take revenge? Think not. Then, M.T was just 11 years when this complaint was made. Usually when a child is subjected to sexual abuse by a relative or person connected to the family there is a tendency to downplay or conceal it to avoid social stigma that such a child would face. Be that as it may even if one assumes for a moment that is a false allegation is it probable for Litiana will create and author a false story

running back 3 ½ years and with an array of every imaginable sexual act included therein? Will she create and concoct such a complicated and complex story running to 3 ½ years? I certainly don't think so. It is simply not reality and not possible. To my mind it is improbable as improbable can be. Especially considering the tender age of M.T the improbability is further compounded. If the mother created a fictitious false allegation to be repeated by your child of 11 years one will expect it to be simple so as to enable her to go to the police and repeat it with ease. Further could have the mother have crafted and authored the fiction to fall in line with the medical evidence? Thus, the said defense taken and the position suggested are improbable to such an extent that they certainly have to be in all probabilities false.

Not being at Nadali in 2017.

41. It is common ground that he accused was not resident in Nadali continuously except during the lock down in 2020. During that period Marama had been working from home. Though the accused suggests that he did not come to Nadali in 2017 as he did not have permission from the leader of Marama's clan he admits coming that in 2018 to construct the house and then he had all the power to chase off the mother and the step father of the complainant from that house which in their traditional family land. This unambiguously establishes that the Accused had veiled a great deal of power and control over Marama and children and in the house, she lived in. Accused had been in a de facto relationship for 19 years which would have started in 2004. Thus it is improbable and unrealistic that he will keep off for a whole year on the face of the so called lack of permission of the chief. To my mind this so called lack of permission is no more than a figment of the accused's imagination put forward as a defence and in any event in the circumstances even if such permission was not granted accused had been in a de facto relationship for 14 years with 3 children from Marama in 2017 will not remain without coming to the house in Nadali. Is highly improbable.

42. Now I will consider the truthfulness of Marama's evidence. At the point of giving evidence she continues to be in the de facto arrangements with the accused and certainly is hoping and wishing that the accused will be free and be there for her and her children as a provider in view of her 19 year relationship. Thus no doubt she is an interested witness. She also stated that in the year 2017 the accused did not visit her or the children. In the normal course of event is this

improbable as evaluated above. Accused and his witness Marama both say that in 2017 Marama and the children were living elsewhere and not at Nadali. Marama says that in 2016 she was residing at Lokia with her parents and then at Auckland Street thereafter both of them claim that Marama came to her house constructed at Nadali. However at the commencement of trial the accused had admitted that during the period 2017 to 2020 M.T was looked after by Marama and Kaveni at Nadali, Nausori 2017 to 2020 - vide, admission (j). Having so admitted the accused and Marama have attempted to change and contradict this admitted fact as aforesaid. This clearly is an inconsistent and a contradictory position taken up by the accused in his defence. The whole purpose in taking a different position is not accidental. The accused is attempting to impress upon this court that in 2016 and 2017 they were not in Nadali. By this the accused is trying to create a doubt on MT's evidence that the sexual acts were committed at Nadali.

43. Considering improbabilities and inconsistencies the evidence of the accused and the defence witness the entire defence evidence including that of the accused is unreliable and is false. These inconsistency namely the contradiction between the admission and the evidence is vital. It is the result of attempt to deliberately change the version as admitted in order to pursue with another line of defence after the trial commence. This couple with improbability leads to the only inference that the accused evidence is false and untrue. Accordingly, I totally reject the accused and his witness's evidence on that bases.

Conclusion


44. The rejection of defence evidence or finding that the accused is lying does not in any way prove the prosecution case. The prosecution still has the burden of proving all ingredients beyond reasonable doubt. I will now consider if the several charges in the information has been so proved. All the acts referred to in the 8 charges are said to have been committed at Nadali. The accused try to make out that in 2017 M.T was living in Auckland Street as the said assertion has been found to be false it creates no doubt on the prosecution evidence as regards the place of offending. Even if one accepts the defence evidence, at some point in 2017 the accused admits M.T coming to Nadali. Therefore there is no doubt the offence could have been

committed at Nadali. As summarized hearing above as the complainant's evidence is accepted the acts on which counts 1, 2, 3, 4, 5, 7 and 8 are based will be proved. However as regards count 6 the insertion of the finger into the vagina had been committed when M.T was in class 3. However the charge alleges that it was between April and June 2002. Therefore there is no evidence as regards such an act being committed during that period. Counts 2 and 4 are attempted rape counts alleging attempted penetration of the anus according to M.T the accused had on several occasions used oil on her anus had tried to penetrate her anus. However due to pain and the difficulty to insert the penis into the anus the accused had been compelled to abandon his pursuit to penetrate the anus. However, at this point the accused has done and performed everything necessary to commit the said offence but failed due to an eventuality beyond his control. Thus, I determine that the offence of attempted rape by attempting to penetrate the anus as described in and charged by counts 2 and 4 have been proved beyond reasonable doubt.

45. As regards counts 1 and 5 M.T very clearly states that the accused licked her vagina and did insert his tongue into her vagina. Licking of the vagina mentioned in the charges had been separately narrated. Further thereto she states that from class 3 up to class 6 the act of penetrating the tongue into her vagina was committed. When you consider M.T evidence in its totality I observe that the accused has predominantly resorted to licking the vagina and the anus of M.T. It appears that this act seems to be one of his foremost acts of engaging in sexual activities committed throughout. However, there are only 2 charges based on insertion of tongue to the vagina. Thus I hold that counts 1 and 5 are proved beyond reasonable doubt. As regards counts 3 M.T in her evidence she states that the accused did apply oil and insert his penis into her anus. The terminology used by her and the answer is as follows "he did on his own force; he brings the oil and he apply oil on his penis and he inserted it into my anus". Thus I hold that count 3 is there by prove beyond reasonable doubt. Then M.T states that when she was in class 6 the accused inserted his penis into her vagina apart from this she also states that the accused puts his penis in her mouth and makes her to suck his penis. These items of evidence prove count 8 beyond reasonable doubt and I determine that count No. 8 is thus proved beyond reasonable doubt. However, count No. 6 remains not proved.

46. As evaluated herein above, the defence taken up that this is a false allegation is extremely improbable. It is so improbable I have concluded it to be false. In these circumstances the said defence put forward by the accused does not in any way create a doubt as such I hold that the evidence of the accused and his witness is false and I reject it in its totality. MT's evidence is credible and reliable. Accordingly I find that the prosecution has proved counts 1, 2, 3, 4, 5, 7 and 8 beyond reasonable doubt. As such, I find the accused guilty of the said counts 1, 2, 3, 4, 5, 7 and 8 as charged. Accordingly I convict the accused in respect of the said counts 1, 2, 3, 4, 5, 7 and 8 separately. However, I acquit the accused in respect of count No. 6 as it remains not proved.




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Justice K.M.G.H.Kulatunga

At Suva

11th May 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused