

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 187 of 2018**

**STATE**

**V**

**JOSESE SESE**

**Counsel** : Mr. U. Lal for the State.  
: Ms. L. Taukei for the Accused.

**Dates of Hearing** : 18, 19, 22, 23 August, 2022  
**Closing Speeches** : 24 August, 2022  
**Date of Judgment** : 25 August, 2022

---

**JUDGMENT**

---

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

1. The Director of Public Prosecutions charged the accused by filing the following information:

**FIRST COUNT**

***Statement of Offence***

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

***Particulars of Offence***

**JOSESE SESE** between 1<sup>st</sup> day of November 2015 to the 30<sup>th</sup> day of November 2015, at Nadi in the Western Division, penetrated the vagina of “L.T”, a child under the age of 13 years, with his finger.

**SECOND COUNT**

***Statement of Offence***

**INDECENT ASSAULT**: Contrary to section 212(1) of the Crimes Act 2009.

***Particulars of Offence***

**JOSESE SESE** between 1<sup>st</sup> day of November 2015 to the 30<sup>th</sup> day of November 2015, at Nadi in the Western Division, unlawfully and indecently assaulted “L.T” by touching her breasts.

**THIRD COUNT**

***Statement of Offence***

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

***Particulars of Offence***

**JOSESE SESE** between 1<sup>st</sup> day of November 2017 to the 31<sup>st</sup> day of January 2017, at Nadi in the Western Division, penetrated the vagina of “L.T”, a child under the age of 13 years, with his finger.

**FOURTH COUNT**

***Statement of Offence***

**INDECENT ASSAULT**: Contrary to section 212(1) of the Crimes Act 2009.

***Particulars of Offence***

**JOSESE SESE** between 1<sup>st</sup> day of November 2018, at Nadi in the Western Division, unlawfully and indecently assaulted “L.T” by touching her breasts.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for the offence of rape (first count), indecent assault (second count) and lesser offence of indecent assault (third count) as charged.

### **BURDEN OF PROOF AND STANDARD OF PROOF**

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.
4. The accused is charged with more than one offence, the evidence in respect of each offence will be considered separately from the other if the accused is guilty of one offence, it does not mean that he is guilty of the other as well. This also applies with the findings of not guilty.

### **ELEMENTS OF THE OFFENCE**

5. To prove the first count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Penetrated the vagina of the complainant “L.T” with his finger;
  - (c) “L.T” was below the age of 13 years.

6. The slightest of penetration of the complainant's vagina by the accused's finger is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case, the complainant was 11 years at the time of the alleged offending and therefore the consent of the complainant is not an issue in regards to this count.
7. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
8. The second element is the act of penetration of the complainant's vagina with the finger.
9. The final element of the offence is the age of the complainant. It is an undisputed fact that the complainant was 11 years in 2015 which establishes that she was below the age of 13 years at the time of the alleged incident.
10. In this trial, the accused denied committing the offence of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his finger as mentioned in the information.
11. This court must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for this court to find the accused guilty of this count. If on the other hand, this court has a reasonable doubt with regard to any of those elements concerning the offence, then this court must find the accused not guilty.

## **INDECENT ASSAULT**

12. To prove the second count and the lesser offence of indecent assault in the third count the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
  - (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant by touching her breast.
13. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed the offences.
14. The words “unlawfully” and “indecently” in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
15. Assault is the unlawful use of force on the complainant by the act of touching her breast.
16. In respect of the offences of indecent assault the accused has denied committing these offences. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant by touching her breast.
17. If this court is satisfied that the prosecution has proved all the elements of the offences of indecent assault beyond reasonable doubt, then this court must find the accused guilty of the offences of indecent assault. However, if there is a reasonable doubt with respect to any elements of the

offences of indecent assault then this court must find the accused not guilty.

18. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

### **ADMITTED FACTS**

19. In this trial, the prosecution and the defence have agreed to certain facts titled as amended admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
20. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

### **PROSECUTION CASE**

21. The complainant informed the court that the accused is her maternal uncle, in 2015 she was 11 years old, student who was residing at Nagado village with her mother. The accused also resided in the same village.
22. In November, 2015 at around midday the complainant was in the kitchen cooking rice she was standing with her back towards the door. The accused came and stood behind her, with his right hand he touched her

right breast from under her arm for 2 minutes. The complainant was wearing a white panty and red dress, after this, the accused lifted her dress and with his left index finger poked inside her vagina from behind. She knew the accused had poked her vagina was because she felt pain before leaving the accused told the complainant not to tell anyone about what he have done to her otherwise he will chop her with a knife.

23. At this time the complainant was alone because her mother had gone to the bathroom which was about 15 meters away from the kitchen. The birth certificate of the complainant was marked and tendered as prosecution exhibit no. 1.
24. In January, 2017 the complainant was at her uncle Tevita Ganilau's house with her sisters Kinisimere and Siteri watching movies. The accused came into the sitting room where the complainant was with her sisters. At this time Siteri left, Kinisimere was standing behind the complainant when the accused was inside the house.
25. The complainant was standing facing the accused, he came and touched the complainant's left breast with his right hand. When the accused did this Kinisimere screamed and the accused went outside. This incident happened at about 2pm. The complainant did not tell anyone about what the accused had done to her because the accused had told her he will chop her with a knife if she told anyone.
26. Upon further questioning the complainant said in respect of November, 2015 she told her father "*uncle Josese has been harassing me*". The complainant remembered reporting the matter to the police when asked what was the report about the complainant said "*it was about uncle Josese*

*touching me.*” The complainant went with her mother to lodge the report at Sabeto Police Station. The complainant identified the accused in court.

27. In cross examination, the witness denied that in her evidence she kept changing her story. When it was suggested that nothing happened in November 2015 the complainant denied this.
28. The complainant agreed that the accused had not said anything to her when he had poked her vagina with his finger. She had the opportunity to call out for assistance since at the time of the incident there were people around. The complainant maintained that the accused had touched her breast and poked her vagina with his finger in November, 2015.
29. The complainant told her father about what the accused had done to her but they did not report the matter to the police because her father wanted to punch the accused. The complainant denied the suggestion that the matter was not reported because it did not happen.
30. According to the complainant Kinisimere is her sister who was standing  $\frac{1}{2}$  meter behind her in the house of her uncle Tevita Ganilau. The complainant maintained that the accused had touched her breast in the presence of Kinisimere in January 2017 at uncle Tevita’s house.
31. When it was suggested that Kinisimere does not recall the incident in January, 2017 the complainant responded by saying at that time Kinisimere was small. The complainant was 11 years old and Kinisimere was 10 years old. When it was also put to the complainant that Kinisimere does not recall the accused had said he would chop the complainant with a knife, the complainant maintained the accused had said these words.



32. The complainant agreed she had grown up with Kinisimere, they were close to each other and the complainant would confide in Kinisimere. The complainant also denied that she had told Kinisimere that the allegations were all lies. When questioned that it was her mother who had made up the allegations against the accused the complainant denied this and said that she was the one who had reported the allegations and not her mother.
33. The complainant denied saying to Kinisimere that her mother had made those allegations against the accused because her mother did not like the accused and also her mother did not want the complainant to talk to the accused. The complainant agreed that in November, 2015 and January 2017 she did not talk to the accused.
34. The complainant agreed that in November, 2015 her contact with the accused was very minimal and in January, 2017 the complainant had not come in contact with the accused. The complainant confirmed that it was not her mother who had raised the allegations against the accused but it was her.
35. In re-examination the complainant clarified that she did not talk to the accused in November 2015 and January 2017 because of what he had done to her.
36. The final witness Moceisau Naruku informed the court that the complainant is her daughter. In November, 2015 the witness was living with the complainant at Nagado village. One day after doing her laundry the witness was going home when she saw a person coming out of her house at this time it was 10am. When she asked the complainant who that person was the complainant said it was the accused who had left because he was afraid of the witness. The witness has also observed that

the complainant would be afraid of the accused and she did not want to stay at home.

37. After this the witness beat the complainant and asked her who had given her all the snacks, lollies and chewing gum the complainant replied the accused had given to her. On 4<sup>th</sup> October, 2018 the witness took the complainant to the police station because the complainant and the witness had fought. The complainant was questioned and the witness was told by the police not to beat the complainant.
38. In cross examination, the witness denied having an argument with the accused because he was making a shed near her house and she did not like it. She also denied calling the accused useless and disrespectful person. She did not at this time hit the accused on his head with a wooden stick. The witness does not like the accused because he did a bad thing.
39. In re-examination, the witness stated that by bad thing she meant he had touched the complainant's breast and body.
40. This was the prosecution case.

### **DEFENCE CASE**

41. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called one witness. This court must also consider their evidence and give such weight as is appropriate.
42. The accused informed the court that he is unable to recall when he came in contact with the complainant in November, 2015. The complainant is

his niece since he is the cousin brother of her mother. He respected his niece so he does not talk to her much. The accused stated that he did not touch the complainant's breast or poke her vagina with his finger in the kitchen of the complainant. He also maintained that he did not threaten the complainant that he will chop her with a knife, according to the accused it was a made up story against him because he did not do it.

43. When questioned further the accused stated "*all this is from her mother and the complainant supported it, because of the fight between me and her mother they made this up*". In respect of the allegation raised by the complainant that the accused had touched the complainant's breast at the house of Tevita Ganilau in the presence of Kinisimere who had screamed upon seeing this, the accused said that he did not do this.
44. The accused could not recall if he was in Nagado in November, 2015. In respect of his relationship with the complainant's mother the accused said he respects her but she is disrespectful to him. In September, 2018 there was a disagreement between the accused and Moceisau (the complainant's mother) about the building of a shed which resulted in a fight between the two whereby the accused was hit on his head with a wooden stick by Moceisau. As a result of this disagreement with Moceisau the complainant and her mother had raised these allegations against him.
45. Finally, the accused maintained that he did not do anything as alleged and he did not threaten the complainant that he will chop her with a knife. The accused said he was not residing in Nagado village during the time of the allegations.
46. In cross examination by the state counsel, the accused maintained that he did not reside in Nagado village in November, 2015 or go into the

kitchen of the complainant and touch her breast and poke her vagina with his index finger. The accused also denied threatening the complainant that he will chop her with a knife if she told this to anyone. The accused also denied in January 2017 he had gone to Tevita Ganilau's house and touched the complainant's breast and he had not threatened her that if she told anyone he will chop her with a knife.

47. The final defence witness Kinisimere Nadroya informed the court that in January, 2017 she was living at Nagado village with her parents and she was 11 years old at the time. The accused is her paternal grandfather and the complainant is her cousin sister. The witness did not come in contact with the accused and the complainant together at Nagado village in January 2017. The witness has a good relationship with the complainant and the accused. In respect of the report made by the complainant against the accused the witness said it was a lie because it did not happen.
48. In cross examination by the State Counsel, the witness stated that the accused is her grandfather and her relationship with the accused is good and she respects him and whenever he would tell her to do something she would do it. However, she denied the suggestion that the accused had asked her to come to court and say whatever he wanted.
49. The witness also stated that she was aware of what the allegation was against the accused since she was told by the complainant. The witness did not recall coming in contact with the complainant and the accused in January 2017, she denied she was told by the accused what to say in court.
50. In re-examination the witness stated that the complainant had told her that she had reported against the accused for harassing "us". When asked

to clarify the word “us” the witness said it meant harassing the complainant, Siteri and Kinisimere.

51. This was the defence case.

### **ANALYSIS**

52. The prosecution alleges that between 1<sup>st</sup> November, 2015 and 30<sup>th</sup> November, 2015 the accused who is the maternal uncle of the complainant at around midday entered the complainant’s kitchen. The accused whilst standing behind the complainant pushed his hand under the arm of the complainant and touched her breast. Thereafter the accused lifted the dress of the complainant and from on top of her panty penetrated his index finger into her vagina. The complainant knew the finger had entered her vagina because she felt pain. The accused threatened the complainant if she told anyone he will chop her with a knife.

53. The complainant was alone in the kitchen she did not tell her mother anything because she was afraid of the accused. At this time the complainant was 11 years of age.

54. The prosecution further submits that between 1<sup>st</sup> January, 2017 and 31<sup>st</sup> January, 2017 the complainant went with her sisters Siteri and Kinisimere to the house of her uncle Tevita Ganilau to watch movies. They were in the sitting room when the accused came and in the presence of Kinisimere who was standing behind the complainant touched the complainant’s breast with his hand. The accused went away after Kinisimere screamed.

55. The complainant's mother Moceisau Naruku had observed that the complainant was afraid of the accused whenever he came home and the complainant did not want to stay home. The prosecution is submitting that the complainant was an honest witness who should be believed and that this court takes into consideration the age of the complainant at the time of the allegations.
56. The delay in reporting was not due to her making but circumstances beyond her control, the delay has been due to the threat of the accused. The complainant was afraid of the accused that she did not tell her mother about what the accused had been doing to her.
57. The matter was reported to the police only after the mother of the complainant took the complainant to the police station. The complainant was refusing to go to the police station because she was worried her mother would be arrested for beating her. It was here the complainant got the opportunity to lodge her complaint against the accused about what he had been doing to her which she did without any hesitation.
58. On the other hand, the defence says the allegations are baseless and a made up story by the complainant. The accused did not do anything to the complainant as alleged how could he have done so when he was not even in Nagado village at the time of the allegations. If the accused had done what the complainant has alleged then she had all the opportunity to shout and yell to call the neighbours or fellow villagers but she did not because nothing had happened.
59. Furthermore, Moceisau had a dislike for the accused and there was an altercation between the accused and Moceisau which had resulted in injuries to the accused. It was the motivation of Moceisau that made the complainant support her mother's ulterior motive by raising the false

allegations. The complainant herself had told the court that she had not been in contact with the accused so how could the accused have done anything to her.

60. Kinisimere the cousin sister of the complainant had no reason to lie to the court when she told the court that she was not at the house of Tevita Ganilau as alleged by the complainant. Kinisimere is close to the complainant and there is no enmity between them so there is no reason why this witness should not be believed. This witness was consistent with what the accused told the court. The mother of the complainant has a dislike for the accused which shows a motivation on her to concoct a story against the accused with the complainant.
61. Finally, the defence submits that the complainant has not told the truth she has made up a story which does not make sense and is riddled with doubt. The defence is asking this court to believe the accused who gave a frank and honest account that he did not do anything to the complainant as alleged.

### **DETERMINATION**

62. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
63. I have disregarded the evidence of the complainant's mother Moceisau that when she reported against the accused in 2015 the accused was taken into police custody and he was bailed out by the police officers on grounds of prejudice to the accused.

64. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a consistent and coherent account of what the accused had done to her, she was also able to withstand cross examination and was not discredited. The complainant was steadfast in what the accused had done to her and she had expressed herself clearly in this regard.
65. I did notice that the complainant was taking her time to answer questions but this cannot be taken against her considering her age at the time and passage of time. The complainant was 11 years in 2015 when the first two incidents took place and two years later in 2017 she was 13 years when she was again confronted with an unexpected experience by the accused her uncle.
66. I have no doubt in my mind that the complainant told the truth in court her demeanour was consistent with her honesty. I accept that the complainant did not tell her mother about what the accused was doing to her because of his threats to her. Furthermore, experience has shown that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not. The fact that the complainant did not shout or yell or push the accused away does not mean that nothing happened. It cannot be ignored that the complainant was a child at the time who was oblivious to the unexpected abuse by her own uncle.

### **LATE REPORTING**

67. It is obvious that there is an issue of late reporting by the complainant to the police. The delay is about three years from the date of the first two incidents in 2015 and about one year from the third incident in 2017. In



law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4<sup>th</sup> October, 2018)* had explained this issue as follows:

*“[24] In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in **Tuuford** 186, N.W. 2d at 548 it was decided that:-*

*“The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”*

*“[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of *Thulia Kali v State of Tamil Nadu*; 1973 AIR.501; 1972 SCR (3) 622:*

*“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and*

*circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”*

68. When the first two incidents happened in 2015 the complainant was 11 years of age, and the final incident happened after two years in 2017 when the complainant was 13 years of age. It was only in 2018 after about three years of the first incidents that the complainant was able to report the matter to the police. I accept that the complainant was threatened by the accused that he will chop her with a knife if she told anyone and the situation of the complainant was further aggravated by the attitude of her mother who used to assault the complainant.
69. The complainant’s mother honestly told the court that she used to beat the complainant particularly after the accused whereabouts or presence in or around her house. The complainant was basically a victim of circumstances. I do not expect the complainant to express what she was going through to anyone other than to someone she would trust and be treated with compassion. The evidence of Moceisau suggests that she did not have any understanding for the complainant but continued to assault her daughter rather than listen to her.

70. I accept that the complainant was restrained by circumstances beyond her control in failing to immediately inform her mother and report the matter to the police. Although the delay is substantial the complainant was of a tender age at the time cannot be blamed, when the opportunity came about she did not hesitate to inform the police about what the accused had done.
71. I also accept that there is no motivation by the mother of the complainant against the accused. The accused himself told the court that a disagreement arose between him and the complainant's mother in 2018 however, the allegations had already occurred in 2015 and 2017. I do not believe Moceisau had a motivation to implicate the accused. The evidence is that the complainant had not told her mother about anything the accused had done to her. The complainant told the court that she was the one who had reported the allegations to the police and not her mother.
72. On the other hand, the accused did not tell the truth he gave a version of events which is not tenable or plausible on the totality of the evidence. I reject the defence assertion that the accused had not done anything to the complainant as unworthy of belief. The demeanour of the accused was not consistent with his honesty he did not tell the truth when he said he did not do anything to the complainant because he was not present.
73. The defence witness Kinisimere also did not tell the truth when she said she did not see the accused and the complainant in the house of Tevita Ganilau because she was not there. It was obvious to me that this witness was saving the accused due to her respect for him. I find it difficult to accept that at the tender age of 10 or 11 years at the time of the allegation Kinisimere was able to recall without any hesitation after about 5 years that in January, 2017 she had not met the complainant and the accused.

74. I also reject the evidence of Kinisimere that without any probing by her the complainant all of a sudden told this witness this year 2022 that she had lied about the allegations against the accused is unbelievable and a made up story to discredit the complainant. I am also at a loss to understand why Kinisimere so confidently said that the incident in the house of Tevita Ganilau did not happen if she was not there is implausible as well.

### **DEFENCE OF ALIBI**

75. It is noted by me that when the accused was giving evidence he took the position that he was not in the complainant's kitchen in November, 2015 and also he was not at the house of Tevita Ganilau in January, 2017. Although the notice of alibi had been withdrawn at the start of the trial, however, in fairness to the accused I have reminded myself of the following:

76. Firstly, the prosecution has to prove the guilt of the accused so that this court is sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the defence of alibi. Even if this court concludes that the alibi was false, that does not by itself entitle this court to find the accused guilty. Secondly, it is borne in mind that an alibi is sometimes invented to bolster a genuine defence.

77. Even if this court concludes that the defence put forward by the accused has not been made out that does not of itself entitle this court to find the accused guilty. The prosecution must still satisfy this court beyond reasonable doubt of his guilt.

78. The accused has denied any wrong doing his defence is he did not commit the offences as alleged since he was not there but somewhere else.

79. Finally, from the above, there are three possibilities that arise which is open for consideration:
- a) If the alibi is accepted then this court is obliged to find the accused not guilty;
  - b) If this court rejects the alibi then this court would not necessarily find the accused guilty but must assess the evidence as a whole; and
  - c) Although this court does not accept the alibi, and also does not reject it in the sense that this court regards it as something which could reasonably be true then in such a case this court must find the accused not guilty.
80. Prematilaka, JA sitting as a single judge in Court of Appeal in *Pauliasi Raisele v State* [2020] FJCA 49; AAU088.2018 (1 May 2020) made a pertinent observation in respect of the above from paragraphs 20 to 28 as follows:

*[20] The learned trial judge had in paragraphs 103 and 125 directed the assessors and himself on the lines suggested in Ram and Mateni. He cannot be faulted in that respect.*

*[21] A slightly different approach, however, had been taken in some other jurisdictions such as Australia, Sri Lanka and New Zealand. Section 150(8) of the Criminal Procedure Act 1986 (NSW) states that*

*“evidence in support of an alibi means evidence tending to show that, by reason of the presence of the accused person at a particular place or in a particular area at a particular time, the accused person was not,*

*or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.”*

*[22] In what would be the appropriate direction on alibi in NSW Roden J at 5-6 (Street CJ, Slattery CJ at CL concurring said in R v Amyouni NSWCCA 18/2/88 unrep. BC8802201:*

*“It seems to me that in every case where that situation is met, there are three possibilities, all three of which should be explained to the jury.”*  
*“One is that they accept the alibi, in which event they would be obliged to acquit. The second is that they reject the alibi, in which case they would not necessarily convict but must assess the evidence as a whole. The third possibility is that although they do not accept the alibi, they also do not reject it in the sense that they regard it as something which could reasonably be true. In that event also, in such a case, they must acquit.”*

*[23] Again in R v Kanaan (2005) 157 A Crim R 238; [2005] NSWCCA 385 Hunt AJA (Adams and Latham JJ concurring) said*

*“[134] It was common ground that the Crown had to establish beyond reasonable doubt that the appellant was present at the crime scene. The appellant complains, however, that at no time did the judge ever in terms direct the jury that, in order to convict the appellant, they had to reject the evidence of alibi beyond reasonable doubt.”*

*“[135]... An alibi asserts that, at the relevant time, the accused was not at X (the scene of the crime) but at Y (somewhere else, according to the alibi evidence). The issue which it raises is whether there is a reasonable possibility that the accused was at Y, rather than X, at that time. To prove beyond reasonable doubt that the accused was at X, the Crown must remove or eliminate that reasonable possibility: Regina v*

*Youssef (1990) 50 A Crim R 1 at 2-3. An appropriate direction to the jury would be:*

*The Crown must establish beyond reasonable doubt that the accused was at X at the relevant time. The Crown cannot do so if there is any reasonable possibility that he was at Y at that time, as asserted by the alibi evidence. The Crown must therefore remove or eliminate any reasonable possibility that the accused was at Y at the relevant time, and also persuade you, on the evidence on which the Crown relies, that beyond reasonable doubt he was at X at that time.”*

*[24] In Sri Lanka in Yahonis Singho v. The Queen (1964) 67 NLR 8 at 9-11 T. S. Fernando J. said*

*‘If the evidence of an alibi is accepted, such acceptance not only throws doubt on the case for the prosecution but, indeed, it does more, it destroys the prosecution case and establishes its falsity. As the jury convicted the appellant, it must be assumed that they did not accept the evidence of Sirimane. The learned judge directed the jury, if we may say so with respect, correctly as to what course they should follow if they rejected the evidence of Sirimane. He, however, omitted altogether at both stages of his charge referred to above to give them any direction as to what they were to do if they neither accepted Sirimane’s evidence as true nor rejected it as untrue. Jurors may well be in that position in regard to the evidence of any witness. There was in this case no question of a shifting of the burden of proof which throughout lay on the prosecution. If Sirimane’s evidence was neither accepted nor was capable of rejection, the resulting position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a*

rejection of the alibi was a non-direction of the jury on a necessary point and thus constituted a misdirection.'

[25] Yahonis Singho was quoted with approval in Mannar Mannan v Republic (1987) 2 SLR 94 where, however, the proviso under section 334(1) of the Code of Criminal Procedure Act was applied and the conviction was upheld which was affirmed by the Supreme Court in Mannar Mannan v Republic (1990) 1 SLR 280.

[26] Blackstone's Criminal Practice 1993 at page 1773 states

'Although there is no general rule of law that in every case where alibi is raised the judge must specifically direct the jury that it is for the prosecution to negative the alibi, it is the clear duty of the judge to give such a direction, if there is danger of the jury thinking that an alibi, because it is called a defence, raises some burden on the defense to establish it (Wood (No.2) (1967) 52 Cr App R 74 per Lord Parker CJ). See also Johnson [1961] 1 WLR 1478 and Denney [1963] Crim LR 191.'

[27] It is well established that it is for the prosecution to negative an alibi as in the case of self-defence or provocation [See Killick v The Queen (1981) 147 CLR565; [1981] HCA 63; 37 ALR 407, R v Johnson (1961) 46 Cr App R 55; 3 ALL ER 969 and R v Taylor [1968] NZLR 981 at 985-6] because by raising an alibi, the accused was not undertaking to prove anything, and that onus remained on the Crown to remove or eliminate any reasonable doubt which may have been created by the alibi claim or any reasonable possibility that the alibi was true [ see R v. Small (1994) 33 NSWLR 575; 72A Crim R 462 (CCA)]. If the alibi evidence is so cogent as to engender in any reasonable mind a doubt of the accused's guilt, the conviction must be quashed and a verdict of an acquittal entered, however cogent the



*prosecution evidence would otherwise be [see Palmer v R (1998) 193 CLR1; [1998] HCA 2; 151 ALR 16]*

*[28] I think that it is in the light of these decisions that one should reconsider as to what the appropriate direction particularly on the intermediate position on alibi defence should be in Fiji. However, it is within the domain of the Full Court of the Court of Appeal to make a pronouncement, if considered appropriate, at least for future guidance.*

81. On a review of the entire evidence before this court particularly the defence of alibi raised and the evidence of Kinisimere I rule that the prosecution which has the burden to disprove the defence of alibi raised has been able to rebut the defence of alibi raised by the defence beyond reasonable doubt. This court is satisfied beyond reasonable doubt that the accused was present in the kitchen of the complainant in November, 2015 and he was also present in the house of Tevita Ganilau as alleged by the complainant. The complainant told the truth on what the accused had done to her and this was narrated coherently by the complainant. I have no reason to doubt that it was the accused who had done what the complainant had alleged.
82. The defence has not been able to create a reasonable doubt in the prosecution case.

### **CONCLUSION**

83. This court is satisfied beyond reasonable doubt that the accused between 1<sup>st</sup> day of November, 2015 to the 30<sup>th</sup> day of November, 2015 penetrated the vagina of the complainant with his finger, a child under the age of 13 years. Furthermore, on the above mentioned date the accused had

unlawfully and indecently assaulted the complainant by touching her breast.

84. This court is also satisfied beyond reasonable doubt that the accused between 1<sup>st</sup> day of January, 2017 to the 31<sup>st</sup> day of January, 2017 unlawfully and indecently assaulted the complainant by touching her breast. In respect of the above two offences of indecent assault this court is also satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse and indecently in what he did to the complainant. The acts of the accused have some elements of indecency that any right minded person would consider such conduct indecent in nature.

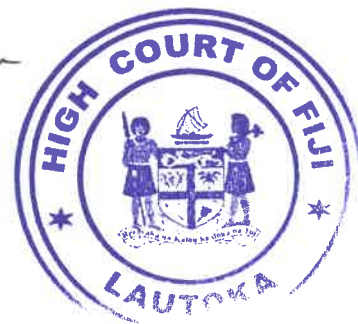
85. In view of the above, I find the accused guilty of one count of rape, and two counts of indecent assault and I convict him accordingly. However, the accused is acquitted of one count of rape in count three and one count of indecent assault in count four.

86. This is the judgment of the court.



**Sunil Sharma**

**Judge**



**At Lautoka**

25 August, 2022

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission, for the Accused.**