

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 82 OF 2020

STATE

.vs.

VILIKESA QATIVI

Counsels: *Ms. L. Latu.* - *for Prosecution*
 Ms. R. Raj - *for Accused*

Date of Judgment: 11th November 2022

JUDGMENT

(The names of the victims are suppressed, as requested by the Prosecution, and will be referred to as SR and VT)

1. The accused in this matter, **Mr. Vilikesa Qativi**, was charged with three counts of **Rape** against two victims, as below:

COUNT 1

Rape: Contrary to **Sections 207(1) and (2) (b) and (3)** of the **Crime Act 2009**.

Particulars of Offence

Vilikesa Qativi, between the 20th day of April 2019 and 5th day of May 2019, at Naterumai, Naitasiri, in the Eastern Division, penetrated the vagina of **SR** a child under the age of 13 years, with his finger.

COUNT 2

Rape: Contrary to **Sections 207(1) and (2) (a)** of the **Crime Act 2009**.

Particulars of Offence

Vilikesa Qativi, between the 1st day of December 2019 and the 24th day of December 2019, at Newtown, Nasinu, in the Central Division, had carnal knowledge of **VT** without her consent.

COUNT 3

Rape: Contrary to Sections 207(1) and (2) (a) of the Crime Act 2009.

Particulars of Offence

Vilikesa Qativi, between the 10th day of September 2020 at Dreketi, in the Northern Division, had carnal knowledge of **VT** without her consent.

2. Upon reading of the charges in Court on 17th November 2021, **Mr. Vilikesa Qaviti** understood and pleaded not guilty to the charges filed against him. At the trial, the Prosecution led the evidence of 5 witnesses, including the evidence of two victims. At the end of the Prosecution case, since the Court was convinced of the availability of a prima facie case for the Prosecution, acting under **Section 231** of the **Criminal Procedure Act of 2009**, Defense was called from the Accused and all the available options were explained to the Accused.
3. At this juncture, the Accused gave evidence for the Defense under cross-examination and led the evidence of 4 other witnesses. At the end of the Defense case, the Court heard oral submissions from Counsel representing the Prosecution and the Defense. Having carefully considered the evidence presented at the trial, this Court now proceed to pronounce the judgment in this matter, as below:

Element of the offences

4. The main elements of the offence of Rape under **Sections 207(1) and (2) (b) and (3)** of the **Crime Act 2009** applicable to this matter are:
 - i) The Accused;
 - ii) Penetrated the vagina of the Complainant with his finger;
 - iii) The Complainant did not consent the Accused to penetrate the vagina with his finger;
 - iv) The Accused knew or believed or was reckless that the Complainant was not consenting for him to insert his finger in that manner.
5. The main elements of the offence of Rape under **Sections 207(1) and (2) (a)** of the **Crime Act 2009** applicable to this matter are:
 - i) The Accused;
 - ii) Penetrated the vagina of the Complainant with his penis;
 - iii) The Complainant did not consent the Accused to penetrate the vagina with his penis;
 - iv) The Accused knew or believed or was reckless that the Complainant was not consenting for him to insert his penis in that manner.
6. In further elaborating this offence under **Section 207 (2) (a)** of the **Crimes Act 2009**, the offence of Rape is defined as follows: *a person rapes another person if the person has carnal knowledge without the other person's consent.* In the context of this case, 'carnal knowledge' encompasses an act of penetration of the vagina or the anus of the Prosecutrix with the Penis of the Accused. A slightest penetration is sufficient to prove the element of penetration. According to **Section 206** of the **Crimes Act of 2009**, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. In this regard, consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.

Burden of Proof

7. The Accused is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests 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 guilt of the Accused, or if there be any hesitation on the part of this Court of the establishment of the ingredients or on the evidence led by the Prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has given evidence in this case. Thus, if this court accepts the defence evidence or is unable to reject or accept the defence evidence, then too the Accused is entitled to a finding in his favour.

Prosecution Case

8. For the Prosecution case, the evidence of **SR, VT, Niumai Ragata, Tokasa Nadroka** and **Dr. Indrid Nelson** were led in Court. The first Prosecution witness was SR, who was 11 years of age at the time of giving evidence. Her ability and competence to answer questions in Court was tested and the Court was satisfied. Giving evidence in Court, she testified, as below:

- "In 2019 I was staying in Naitasiri at Natero village. I was staying with my mum, Niumai Ragata and other siblings. They were Vila, Vara and brother Tale. Vara is my oldest sister.
- In 2019 when I was staying with them in Naitasiri my vagina (mimi) was touched by Vilikesa.
- It happened at night. I was writing my home work at that time.
- I got a shock when his hands touched my stomach. He inserted his fingers to my panty and touched my vagina. I knew that since I felt it. I was frightened.
- When he was doing that I felt his figures. I felt shocked. I didn't feel anything else. I knew that it was his figure because I saw him.
- It is the right finger that he used. I felt, he touched my mimi since I just knew. I use my vagina to pee. He touched outside of my vagina.
- I was frightened at this moment. I was just scared.
- At this time my mother and sisters and brother were asleep. I was also sleeping.
- I say that the Accused did this since the light was on. This was the solar light.
- Solar light was in the room. So I could see the Accused. First accused touched my stomach and then the vagina. I was lying face down, Accused was very close. Accused came from the right side and lied down in the right. Nothing was blocking my view of Vilikesa the Accused.
- Accused didn't say anything. Accused did this for a short while.
- I felt pain when the Accused was doing this. He didn't do anything after that.
- I didn't tell my mother but told my sister Vara when they came to Vanua Levu. I didn't inform earlier since the Accused was around and I was frightened. I told this to my sister and she told my mother.
- I was frightened and I didn't tell my mother the same night. I told Vara and Vara told the mother and to the police. After that I was taken for medical examination, where I was checked by a doctor. Doctor got me to lie down and checked my vagina. This was an I-toke doctor.
- Accused is my step brother. My mother is the Mother of the Accused. In 2019 my father was also there in Netasiri and I didn't tell my father, since I was frightened.
- I see the Accused in Court in the dock. He is the person who did this to me".

9. In cross examination, this witness was challenged by the Defense in relation to the incident she claimed. It was the Defense position that the Accused was in Nuaa Settlement in 2019 and he never went to Viti Levu in 2019, which this witness confidently rejected claiming that they were together at Naitasiri.

Further, when on several occasions Defense alluded that the Accused did not insert his finger inside her panty and touched her vagina, this Court observed the tenacity of this witness in diligently holding on to her stance.

10. In considering the above demeanor of this witness of tender years in facing the fierce challenge by the Defense of her version of events, this Court has no doubt of the veracity of the evidence of this witness in relation to the allegation made by her against the Accused.
11. The second Prosecution witness (PW2) was VT, the older sister of SR. who was 16 years of age at the time of giving evidence. Her ability and competence to answer questions in Court was tested and the Court was satisfied. Giving evidence in Court, in relation to Count 2 and Count 3, she testified, as below:

Count 2

- “In December 2019 I was in Newtown, Suva in my brother Mika’s house. My brother’s wife was pregnant and I was helping. I was there during school holidays. Apart from Mika’s family no one else was there in that house. At this time my mother was in Netasiri. My uncle was the neighbor, he is Selasa. He has 6 children.
- Vilikesa is my step – brother, we have the same mother.
- In December 2019 one day we were at home. Mika’s wife asked me to make tea. After that I went to prepare dinner. After that I went to my uncle’s place and played cards with his children and Wilikesa. That was around 8-9pm.
- After playing cards I slept in the living room of my uncle’s house. Vilikesa went out and the uncle’s children also slept in the living room.
- Later Vilikesa also returned to sleep. I was at the corner of the living room sleeping. I felt Vilikesa touching me. He blocked my mouth with his hand and sat on my waist.
- Then he took off his trousers and took off my skirt and panty and tried inserting his penis to my vagina. Then his penis entered my vagina and I was weak and I was shaking and couldn’t feel myself and when he did that I felt pain. I couldn’t realize the duration of the act.
- After the act I woke up and tried to sit up, thought I was dreaming. My clothes were already on. I can’t remember my clothes being put on. I don’t know how they were put back. I realized what has happened to me. Vilikesa has left for work at 6 am.
- When Vilikesa was blocking my mouth I was trying to free myself without success.
- I knew it was Wilikesa blocking my mouth since the light in the bedroom was coming to the living room. At the time of doing this Vilikesa was very close. Nothing was blocking my view.
- I was not mistaken that this was Vilikesa. I did not give permission to Vilikesa to do this.
- I didn’t tell anybody about this since I was frightened. I didn’t disclose this to Mika or my uncle, since I was frightened. I didn’t disclosed this to anyone.

Count 3

- In July 2020 we shifted from Naitasiri and moved to Naua. I, my mum and siblings moved. We came and stayed at my mother’s younger brother’s house. Then I attended the Amadhiya Muslim School. My uncle was Rupeni. Only we were there, my family, uncle and his family.
- On 10/09/2020 was my older sister’s son’s first birthday. My older sister is Sulita.
- My uncle asked Vilikesa to come and take some yum. At that time he was living with my sister Sulita in Dreketi.
- Vilikesa came to take Yam in the night. He didn’t go back due to having no transport. Vilikesa stayed with us and slept at my uncle’s place. He came at 6 pm. He had dinner.

- Then we played Sapoi. Myself and my uncle's children. My uncle and my aunt and my siblings went to sleep. I and my uncle's children were sleeping in the living room. Vilikesa also went to sleep in the same living room.
- That night Vilikesa did exactly the same as he did earlier at Newtown. That is, when I was asleep he blocked my mouth. I was wearing a Sulu, where the Accused pulled my panty and pulled it to a side. He attempted to insert his penis to my vagina.
- He did a forward and backwards motion. At that time his penis was inside my vagina. He inserted his penis inside my vagina. He was doing this for a while. My panty was still on then.
- When Vilikesa was doing this I tried to push him away, because I didn't like what he was doing.
- Then he stood up and left. He told me not to talk. I cried and lied down beside my cousin until daybreak. At the time I got up Vilikesa was gone. I didn't inform the cousin because I didn't trust her, since they talk. My mother was at my sister Sulita's house. I didn't alert my uncle or aunt, since I was frightened.
- I identified the Accused since the light in the living room was on. When Vilikesa did this he was very close to me, nothing was blocking me from seeing Vilikesa and he is my brother.
- I disclosed this to my mother at my uncle's place on 23/09/2020. At this time the Accused was at this home, since he came back. On this day I was crying, I told my mother I will not go to school and my mother asked me why I was crying.
- When she asked me for the reason I told everything that happened in Newtown and Naua. This was on 23/09/2020. Then she told the Accused to seek forgiveness from us.
- Vilikesa was there when I told my mother. Mother wanted to know the truth. My sister was also sitting there then.
- At this time Vilikesa admitted to doing this. My mum told Vilikesa to ask for forgiveness from us, which he did.
- Then he went back to sleep and I went to school. I was crying on the way. What has happened was still painful. I couldn't believe that forgiveness was the end.
- I was crying in the toilet of the school and a friend asked me what happened. On her instruction I went to see the year manager and teacher. I saw Ms. Tokasa in the library and I was crying and I told her what happened to me and my sister and the idea of forgiveness.
- Ms. Tokasa told me to write a statement. Then she went and spoke to the principal. Teachers have reported this to police and the police came.
- I was taken for a medical examination on the same day to the Labasa hospital.
- This was the same day I told my mother and Ms. Tokasa.
- Female doctor examined me. The person who did that to me is present in Court in the dock.
- I didn't report the initial incident, since my father was in prison and there was a case against him made by my eldest sister. Because of that I did not disclose this to anyone."

12. This witness was extensively cross examined and this witness was challenged by the Defense in relation to the incidents she claimed. It was the Defense position that the Accused did not insert his penis to her vagina and she made a false complaint against the accused and this was a fabrication.

13. In observing the demeanor and deportment of this witness and the manner in which she promptly answered the questions put by the Defense most of the time, though this Court observed that VT has had a troubled childhood due to altercations between parents and the requirement to change the place of residence, she explained the events that took place in her own language to the best of her ability, where on answering certain questions she took time to recall the events that took place.

14. The next Prosecution witness was Dr. Ingrid Nilsen, who conducted the medical examination in relation to SR and VT. Referring **PEX1**, she mentioned that this was the medical report prepared on the examination of SR on 23/10/2020. At the time of examination, entry to the vagina of SR had been red. Hymen had been broken at 3 o'clock and 7 o'clock positions. According to her, this meant that the

vagina had been penetrated. In her opinion, this is unusual for an 8 year old child. However, there had been no other bruising or lacerations noted around her vulva or vaginal area.

15. She informed Court that **PEX2** was prepared in relation to the medical examination done for VT on 23/10/2020. In examining, she had noticed blood coming out of her vagina, but there had been no lacerations or bruising. Crescent of the hymen had not been continuous from 9 o'clock to 3 o'clock. There had been penetration to the vagina and this child had been exposed to sexual activity. Medical finding had matched with the history given by the victim of sexual assault by her brother.
16. Prosecution witness 4 was Tokasa Nadroka, who was a teacher at Amadhiya Muslim School for 11 years. On 23/10/2020 VT had come to her and informed her about an incident, where she was raped by her brother. VT had mentioned that she is sick of her cloths getting blood stained. On meeting her, VT had started crying and VT had told her that she informed her mother of this incident and the mother asked her brother to apologize her in front of the family. She had asked VT to write a statement of the incident and taken that to the principal, who had reported to the police.
17. The last witness for the Prosecution was Nuimai Ragata, the mother of the Accused and victims. According to her, in October 2020 when she was preparing lunch for children VT had refused to go to school that day. When she asked her, VT had started crying. She had taken her out and with the greatest difficulty VT had told that the Accused was doing wrong things to her. She had not believed this, since they were brother and sister. She had called both children together and spoken to them as the mother and asked them to reconcile. She had also wanted to know whether what was said to her was true. VT had been crying and the Accused had been quiet for a long time and he had asked VT for forgiveness. Thereafter VT had kept on crying for a long time and VT had found it hard to forgive the Accused. Thereafter, the Accused had confessed to VT. She had been sad and frightened when she saw these things happening as their mother. In 2019 December they had been living in Netasiri, herself with her 4 younger children had moved to Rupeni's house in Naua in 2020.

Evaluation of Prosecution Evidence

18. In the first Count filed against the Accused in this matter, it is alleged by the Prosecution that the Accused committed **Rape** under **Sections 207(1) and (2) (b) and (3)** of the **Crime Act 2009**. However for the establishment of this Count, the Prosecution has to prove that the Accused penetrated the vagina of the Complainant (SR) with his finger. Nevertheless, in giving evidence in this Court SR only mentioned that the Accused inserted his fingers to her panty and touched her vagina and there is no mention of penetrating the vagina with his finger.
19. In considering the evidence given by VT, I perceive that the incidents complained by VT in relation to the 2nd and the 3rd Counts receives consistency, since the occurrence of these events had been told to other witnesses by VT as confirmed in Court. In this regard, VT had complained of the incident engulfed in the 2nd and 3rd Counts to her mother Nuimai Ragata. Further, VT had informed of the incident encompassing the 3rd Count to her teacher Tokasa and given a case history to Dr. Ingrid Nilson at the time of her medical examination on 23/10/2020.
20. To the question raised by the Defense as to why VT didn't complain of these incidents to any adult earlier, this witness explains that she didn't tell anybody about this since she was frightened. Further explaining this fear she claims that, "I didn't report the initial incident, since my father was in prison and there was a case against him against my eldest sister". Therefore, this witness had not complained of the incident in relation Count 2, since she had been deprived of the company of her father due to complications that arose subsequent to a similar incident between her eldest sister and father. Also, in

answering the question raised by the Defense as to why she didn't complain to her cousin, she firmly expressed that she didn't trust her cousin because they go around and talk.

21. However, consequent to the second incident that is contemplated in Count 3, VT had been facing another problem of her cloths getting blood stained all the time. In fact, this witness had refused to go to school and complained of the sexual acts in issue to her mother. Further, in complaining of these incidents and the subsequent episode of forgiveness, she had told Ms. Tokasa categorically that she is sick of her cloths getting blood stained, as a consequence. Even at the time of medical examination almost a month later, Dr. Ingrid Nilsen had noticed blood coming out of VT's vagina continuously. Therefore, the physical agony and inconvenience caused to VT due to the sexual act contemplated in Count 3 had prompted her to complain of this incident to her mother and school teacher.
22. In cross-examination of VT, Defense claimed that she is making false allegations against the Accused, since the Accused reproached her on her addiction to her phone. Rejecting this accusation, I observed the manner in which VT firmly held on to her stance. Further, I also noticed her referring to the Accused with due respect and echoing through her evidence that she was shocked and frightened of these incidents, since they were brother and sister. Therefore, on the whole, I had no reasons to disbelieve the evidence given by this witness in Court

Defense Case

23. For the Defense case, the Accused opted to give evidence and four other witnesses were called. In giving evidence in relation to the allegations made against him by SR and VT, the Accused stated as follows:
 - "I stay at Dreketi and had been living there for 1 year. Before I was residing in Nagoda, Bua for 4 years. Before that I was living in Vunakata with my uncle.
 - I did not go to Naitasiri in 2019, I was here in Vanua Levu.
 - With SR and VT, I can't remember spending time as a family.
 - I was not in Naitasiri, Viti Levu in 2019, I was in Dama, Bua and stayed with my grandmother Pauline and my uncle.
 - I have not penetrated SR's vagina with my finger.
 - I don't know why SR is making this allegation.
 - I was not in Newtown Vithi Levu in December 2019, I was at my sister's place after my operation in November 2019. In December I had my dressing and review.
 - When I was in Suva I stayed with Mika at Newtown. Mika was the neighbor of my uncle Selasa.
 - I didn't do anything to VT in Selasa's house in 2019 December. I didn't rape her at this time and have sex with her, since I was not there. At this time, I was recovering at Navimoli. I don't know why VT is making such an allegation.
 - In 2019 I was in Labasa having my operation and attending reviews in hospital. I deny this allegation.
 - With VT I didn't have a good relationship, since she hated me and my sister, because her father went to prison because of my sister.
 - In 2020 January I was in Suva and working there for a while. After a funeral in Bua, Vanua Levu I returned there in June or July 2020.
 - In 2020 I didn't go to uncle Rupeli's house. On 9th September 2020, I picked the Yam from the plantation of uncle Rupeli that is 50m away from the house and came back in the afternoon bus to Navimoli.

- I didn't have sex with VT on the 9th, I have never had sex with her. I don't know why she is making this complaint.
- On the 23rd October 2020, VT was crying and my mother had a conversation with us. VT told my mother that I did things to her. When my mother questioned me I said I don't know.
- Then my mother brought VT and asked me to ask for forgiveness from VT.
- VT was crying and I asked for forgiveness. I made a confession to VT. I asked for forgiveness from VT, because she said that I did things to her.
- I really don't know why. I thought I said bad things to her and that I slapped her that day and I can't remember the reason.
- I just asked for forgiveness and left. My mother never told me about making a complaint.
- On 10th of September, I was building sheds at my sister's place after that I went to my uncle Inosa Qativi's place for some grog. I stayed there that night and didn't go to Naua.
- I didn't do any of these acts or do anything to SR or VT.
- SR and VT are my step sisters and they were always in the care of my mother. I used to visit them in Netasiri during the weekend.
- They are making these allegations since they had neglected my grandmother and I was helping my grandmother."

24. As per the above evidence given by the Accused, he vehemently rejects the alleged sexual acts with SR and VT. In relation to the 1st Count he claims that he was not in Naitasiri, Viti Levu in 2019 and he was in Dama, Bua. In relation to the period in issue for the 2nd Count, he highlights that he was not in Newtown Viti Levu in December 2019 and he was at his sister's place after his operation in November 2019 and was attending to his dressing in December. In relation to the 3rd Count, he contends that in 2020 he didn't go to uncle Rupeli's house, but on 9th September 2020 he picked the Yam from the plantation of uncle Rupeli and came back in the afternoon bus to Navimoli.
25. The 2nd witness for the Defense was Inosa Qativi, who was the uncle of the Accused. According to him, he lived in Vinkata in 2020 and on 10th September he had been at home drinking grog with friends from 9am. On that day, the Accused had come home at about 6pm. In his evidence, at one point he stated that the Accused stayed the night and later on he stated that the Accused stayed there till night. He further confirmed that he can't remember whether the Accused was in his house the next day morning. Still further, he alluded that he is not aware whether the Accused went to the Naua settlement that day or not.
26. The 3rd witness for the Defense was Dr. Titilia Tamaicakai from the surgical department of the Labasa hospital. According to her, the Accused had an operation on the 15th November 2019 and was discharged on the 17th. This was a minor surgery and a very straight forward surgery with 4 cm localized incision. Though the Accused had stiches they were removed within 7-10 days. Only one week review with the hospital and was discharged completely. Further, there had been no confirmation whether the Accused came for the review or attended any other hospital.
27. The next Defense witness was Sakiusa Rakoso, the cousin of the Accused. According to him, on 10th September 2020 they had been together at Sulita's son's birthday at Naua. He had been there for 30 minutes and gone back home. Later, the Accused had been at Inosa Qativi's house. However, in cross-examination, he confirmed that he cannot confirm of the whereabouts of the Accused of the night of 10th September and he does not know whether the Accused went to uncle Rupeli's house that night.

28. Though the sister of the Accused, Sulita, was called as the last Defense witness, the counsel for the Defense confirmed to this Court that the Defense was not relying on her evidence, as she couldn't remember the events in issue in Court.

Evaluation of Defense Evidence

29. In considering the evidence given by the Accused in this Court, I see that there is no evidence to establish the complete absence of the Accused at the places where the offences alleged had been committed. In this regard, as per the 1st Count, though the Accused claimed that he was not in Naitasiri, Viti Levu in 2019 and he was in Dama, Bua, in the same testimony he confirms that SR and VT are his step sisters and they were always in the care of my mother and he used to visit them in Naitasiri during the weekends. In relation to the 2nd Count, though he states that he didn't do anything to VT at uncle Selasa's house in 2019 December and he was in Labasa having his operation and attending reviews in hospital, according to Dr. Titilia Tamaicakai, the Accused has had a minor surgery on the 15th November 2019 and had been discharged on the 17th November, where he was completely discharged after one weeks review after surgery. With regard to Count 3 the Accused admits that he picked the Yam from the plantation of uncle Rupeli that is about 50 meters away from the house where VT claims the incident occurred. Therefore, in all these occasions the possibility of the Accused accessing the locality where the offences were committed can't be ignored.
30. As per the claimed confession made by the Accused to VT and asking for forgiveness from her in the presence of their mother demonstrates the subsequent conduct of the Accused after these matters were brought to the attention of their mother. According to the Accused, VT had been crying and he had asked for forgiveness and made a confession to VT, because she said that he did things to her. In carefully considering the evidence of the Accused the conclusion I can reach is that a grown up boy like the Accused with an average level of education and experience in managing life by himself had asked for forgiveness from his sister without any threat or pressure from anyone because he realized that he had done wrong things to her.
31. The main position taken up by the Accused against these charges is that of a false allegation and fabrication. In view of the evaluation of the Prosecution evidence and the above evaluation, I come to the finding that a fabrication or false allegation is extremely improbable. Therefore I am of the view that the main defense taken up in the evidence of the Accused is so improbable and thus it is in all probabilities false.
32. In relation to the evidence of **Inosa Qativi**, while stating that he was drinking grog from 9 am till night that day and that he is not aware whether the Accused went to the Naua settlement that day or not, he also made a contradiction as to the accused sleeping over in his house that night and returning that night. I observed the demeanor of this witness, where he was not certain about what he said in Court. Therefore, I am of the view that it is not safe to accept his evidence.
33. Witness **Sakiusa Rakoso** admitted in Court that he cannot confirm of the whereabouts of the Accused of the night of 10th September and he does not know whether the Accused went to uncle Rupeli's house that night. Therefore, his evidence is of no use in determining the innocence of the Accused in relation to the 3rd Count.
34. The fact that the defense is so disbelieved or the defense evidence being rejected in no way will prove the charges. The burden of proof is with the prosecution to prove all ingredients of the charges beyond reasonable doubt. That burden does not shift to the defense in any way. Now I will proceed to consider

that totality of the evidence to ascertain if all ingredients have been proved on the required criminal standard by the prosecution.

Finding of Court

35. In this matter, in relation to Count No. 1, as mentioned above, there is no sufficient evidence to prove rape committed by the Accused against SR. But the evidence led in Court established the following elements needed for **Sexual Assault** contrary to **Section 210(1) (a)** of the **Crimes Act of 2009**.
- i) The Accused;
 - ii) Unlawfully and indecently;
 - iii) Assaulted the Complainant
36. Therefore, I find that the Prosecution has established all the required elements for **Sexual Assault** in the evidence led through SR for Count 1 beyond reasonable doubt.
37. Considering the elements that needs to be established in this matter in relation to Rape for Counts 2 and 3, as stipulated in this judgement, firstly there is no doubt in relation to the identity of the Accused by VT. As per the second and third elements, VT has informed this Court that the Accused inserted his penis to her vagina, by covering her mouth with his hand, without her consent. Therefore, the Accused had known or believed or was reckless that VT was not consenting and to avoid anyone knowing of his act, he covered the mouth of VT. In this sense, all the required elements for rape has been established by the Prosecution through the evidence of Prosecution witnesses beyond reasonable doubt.

Conclusion

38. In the circumstances highlighted above, acting under Section 160 (1) of the Criminal Procedure Act of 2009, I convict the Accused for **Sexual Assault** contrary to **Section 210(1) (a)** of the **Crimes Act of 2009** for Count 1. Further, I find Accused guilty of Count No. 2 and No. 3 for Rape and the Accused is hereby convicted of the said Count No1 and No. 2 separately.
39. Parties have 30 days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to read "Thushara Kumarage", written over a horizontal line.

Hon. Justice Dr. Thushara Kumarage

At Labasa
09 November 2022