

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

**Crim. Case No: HAC 186 of 2021**

**STATE**

vs.

**VILIAME JITOKO**

**Counsel:** Ms. W. Elo for the State  
Mr. M. Fesaitu & I. Eeremasi for the Accused

**Date of Hearing:** 14<sup>th</sup> to 16<sup>th</sup> March 2023

**Date of Closing Submission:** 17<sup>th</sup> March 2023

**Date of Judgment:** 24<sup>th</sup> March 2023

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**JUDGMENT**

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1. The Director of Public Prosecutions has charged the accused for the following offences as per the Amended Information dated 13<sup>th</sup> March, 2023:

**COUNT ONE**

*Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**VILIAME JITOKO** on an unknown date between the 1<sup>st</sup> day of January 2019 and the 30<sup>th</sup> day of April 2019 at Makoi, in the Central Division, penetrated the vagina of **LL**, with his fingers without her consent.

**COUNT TWO**

*Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**VILIAME JITOKO** on an unknown date between the 1<sup>st</sup> day of June 2020 and the 30<sup>th</sup> day of June 2020 at Makoi, in the Central Division, penetrated the vagina of **LL**, with his fingers without her consent.

2. This trial was scheduled to commence on the 13<sup>th</sup> March, 2023 on which day the State Counsel informed that she intends to file amended information as the victim has reached thirteen years of age as at the date of the alleged offence. Accordingly commencement of the trial was postponed to the 14<sup>th</sup> March, 2023. On which day amended information was filed with two counts of rape. It was read to the Accused and he pleaded not guilty. Evidence of victim and her mother was led and the Accused gave evidence on his behalf. Leading of evidence concluded on the 16<sup>th</sup> March, 2023. Both parties made oral submissions and the matter was fixed for Judgment for today (22<sup>nd</sup> March, 2023).
3. On a close perusal of the information I observed a discrepancy between the statement of the offence and the particulars. According to particulars the alleged act in both counts is the penetration of the vagina with fingers. This was the basis of the evidence led in this court. The offence is one which falls under Section 207(1) and (2) (b) of the Crimes Act. However, the statement of offence refers to Section 207(1) (2) (a) this is reference to carnal knowledge. There is an obvious error in stating the provision of law *vis-à-vis* the

particulars.

4. If the charge is defective the benefit should accrue to the Accused. If it is mere error that does not cause any prejudice to the Accused or mislead in his defence then this court may lawfully proceed on the charge notwithstanding such error. The particulars of the offence clearly describes the acts alleged to have been committed. There is no ambiguity. However, the statement of offence does refer to Section 2(a) of Section 207(1). Section 207(1) is the penal section of the offence of rape. It is clearly stated. Section 207(2) consists of further description to which a certain extend is a part of the definition of the offence of rape. 2(a) refers to carnal knowledge. This has no application to the conduct described in the particulars. It ought to 2(b) which is relevant to digital penetration. Therefore, an error had been made in stating the descriptive provision of this offence. However, the penal provision, namely Section 207(1) is correctly stated.
5. In these circumstances, what this court should be mindful and consider with the issue of prejudice and possible misleading of the defence. As the correct penal section is stated along with the description of digital penetration in the particulars there was sufficient and reasonable notice to the Accused of the offending act and the offence he is faced with and was required to answer. The defence taken up in the course of trial is one of total denial. Therefore, the apparent error in stating the incorrect descriptive provision has not caused any prejudice to the Accused nor misled the Accused in his defence.
6. I am also of the view that as the correct penal provision has been mentioned along with a clear description of the act, the reference to an incorrect descriptive provision does not make this charge illegal or defective goes to invalidate the charge. The stating of a wrong descriptive provision by itself does not render such a charge illegal. As no prejudice is caused to the Accused. I will proceed to consider the evidence and pronounce my judgment on the basis that the alleged offences are violations of Section 207(1) and (2) (b) of the Crimes Act.
7. The prosecution case was closed with the evidence of 2 witnesses the victim LL and her mother Lily Lagilagimaio tago. As it appeared to this court that there was prima facie evidence of the charges, the defence was called for and the rights of the accused were

explained. The accused opted to give evidence but did not call any witnesses. This court having heard the closing submissions, will now endeavor to pronounce the judgment.

8. For the Accused to be found guilty of the two counts of Rape in the present case based on sub sections 1 and 2(b) of Section 207 that in addition to the date stated in the respective count the prosecution must prove beyond reasonable doubt, the following elements, that;
  - i) The Accused,
  - ii) Penetrated the vagina of the Complainant with his fingers,
  - iii) The Complainant did not consent to the Accused to penetrate her vagina with his fingers,
  - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his fingers in that manner.

The slightest penetration of the complainant's vulva by the Accused's fingers is sufficient to satisfy penetration.

9. If I may elaborate counts No.1 and 2 that of rape is based on sub sections 2(b) of Section 207 of the Crimes Act. Under this section, the offence of Rape is constituted when a person the finger into the vagina without that other person's consent. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, 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. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.
10. 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 or if it creates a reasonable doubt then too the accused is entitled to finding in his favour.

### Prosecution Case

#### 11. Admitted Facts

1. The name of the person charged is Viliame Jitoko ['Viliame'].
2. Viliame was born on 25 April 1965 and was 53 years old in April 2019.
3. The complainant is LL ['L'].
4. LL was born on 10 August 2005 and was 13 years old in April 2019.
5. There is a domestic relationship between Viliame and LL namely, Viliame is LL biological father.
6. LL biological mother's name is Lily Lagilagi ['Lily'].
7. Wife resides in Vadravadra, Ba whilst Viliame resides in Uca Place, Makoi, Suva.
8. Viliame and LL have been legally separated since December, 2019.
9. It is agreed that the admissibility of the following documents are not in dispute and the same is tendered by consent and annexed as follows:-
  - a. Copy of the birth certificate of LL.

### Summary of Evidence

12. The victim LL is the biological daughter of the Accused Viliame Jitoko. It is alleged that between the 01<sup>st</sup> January, 2019 and the 30<sup>th</sup> April, 2019 and then between the 1<sup>st</sup> day of June 2020 and 30 June, 2020 at Makoi on two occasions the Accused is said to have inserted his fingers into the vagina of the victim and committed digital Rape. The victim had been around 13 years when these incidents have taken place. At this trial the victim LL and her mother Lily Lagilagimaiotago were called on behalf of the prosecution and then the Accused give evidence on his behalf. According to the victim she with her parents and the four siblings were living at Makoi in her father's family home. During the year 2019 her father has been attached Lakeba Island in the Lau Group and was serving as a police officer. He used to come to Suva to attend to various duties and stays at home may be for periods of 2 weeks to a month when he so returns. In 2019 when she was in Form 3 she was sleeping in her room alone. Her mother and the Accused occupied the adjoining room and that night her other siblings have been sleeping in the sitting room. This house consisted of two room and a sitting area.

13. Whilst she was asleep she was suddenly awakened and realised that someone was touching her and she had felt pain in her vagina. She had then seen her father the Accused having three fingers inserted into her vagina. She had seen the Accused and identified him from the light that came in through the two windows of that room. She had attempted to push him but he had asked her to keep still. She had laid down and was crying as she was afraid but however had then pushed him and run out of the house. The Accused had followed her and warned her that she should not tell anybody and if done so he will do something. The Accused had then gone in and the victim has remained out crying for about ½ an hour and then she herself had gone in and slept.
  
14. Towards December 2019 her mother had separated from her father and she had gone to Ba and lived with her defecto partner. The mother had taken the younger sibling with her. Her two elder siblings, two boys of 20 years and 19 years were left behind with her. After the mother left the Accused had come back to Suva and was with the family since then. During this time in June 2020, the father had been cultivating his plantation a short distance away from their house. On a particular day he had sent the two elder siblings to the plantation for the night. The victim had been alone at home with the Accused. She had gone to bed that night as usual and around 2am the Accused had come to her room. She had noticed her father “strongly opening” the door. She meant the door was somewhat forcibly pushed open. The Accused had walked towards her bed the victim was afraid. She had started crying as she anticipated that something will happen to her again. The Accused had come up to her pulled her trousers and panty below the knee and then has inserted his three fingers into her vagina. She had been lying face upwards on the bed. She had felt pain and after about 3 minutes she had managed to push him away and run out of the house towards a guava tree that was in the garden. She had stayed out for her brothers to return and after their return she has gone in and slept.
  
15. On both these occasions the victim has not told anybody and remained silent. According to her, she was afraid and also on the first occasion as her mother was living with the father she had been reluctant to tell her or her siblings and she had also thought they would not believe her.

16. On the 5<sup>th</sup> December, 2020 LL was found by her mother consuming alcohol with a friend. The mother had come in search of her and then sworn at her and also punched her. At this point the victim had for the first time told her mother that her father the Accused had been sexually abusing her. LL's position is that this was the first time she consumed alcohol and the primary reason was to forget or get over the trauma of been abused by her father. After informing her mother within a day or two she had been taken to the police station and a report has been made on the 7<sup>th</sup> December, 2020.
  
17. In cross-examination it was suggested that her mother Lily who influenced her to make a false allegation against her father. It was also suggested that the father did not insert his fingers into her vagina and the allegation is false. The defence also suggested to LL that when she was caught drinking alcohol and was slapped by the mother and there was a possibility of this being conveyed to her father who would have been extremely harsh on her, and LL as an excuse to escape made this false allegation.
  
18. PW2 Lily has in her evidence narrated a similar sequence of events as stated above. She states that on the 5<sup>th</sup> December, 2020 she found her daughter missing and when she looked around she found her with a friend drinking alcohol. Lily has been greatly annoyed and has shouted at her and also slapped her. At this point LL has alleged that her mother does not love her. Spontaneously Lily has told that she does love her and told that she does not want her to go out drinking. Then LL has told her "you don't know what dad has been doing to me". When asked what it was she had said that her dad is always trying to do things to her. When asked what exactly happened, LL has told that her father had been touching her with his hands sexually. This had prompted her to take LL and report the matter to the police. It is her position that she could not believe that the Accused would have done something like this. However, as this was told by her daughter she had taken her to the police.

19. It was suggested to her that she falsely fabricated this allegation of rape against the Accused because she wanted to come to their house in Makoi and live with the children and her defecto partner, this she denied.

#### Defence Case

20. The Accused in his evidence did not dispute and admitted much of the sequence of events and the timeline as narrated by the prosecution witnesses. The Accused admits that the victim was living with her siblings and her mother in his family home at Makoi. He also admits punishing and pushing the chair at LL and that she complaint to the police. Upon which he was arrested and kept overnight at the Nausori Police Station and had been subsequently charged with assault. Accused had pleaded guilty to the said charge and a short sentence of 3 months have been imposed which has been suspended. This matter so concluded before December 2020.
21. The Accused denies committing any act of sexual abuse as alleged by LL. According to him Lily has separated and left him in December 2019. He was employed as a police officer and was attached to the Lakeba Police during 2019. He admits coming to Suva for official duties and spending a time at home for periods of 2 weeks or more. After his wife left he had returned to Suva at the end of 2019 and in April 2020 he had retired from active service. He admitted that after his wife left he was living with another lady who was his defecto partner. She was living at the Makoi house with him after his wife left him.
22. The Accused totally denies committing any act of sexual abuse and said that he was shocked, surprised and angry when he heard about the allegation of rape.
23. The Accuse stated that whilst he was in remand for a few days in October 2020 for the assault matter and also when he was subsequently remanded for the rape allegation for several months his former wife Lily had approached him through the police and requested that she be permitted to come and reside at the Makoi house. The Accused has refused this request and told her to leave immediately. Thus, his position is that Lily in order to come and live in this house fabricated this false allegation to have him remanded.



### Sequence Events and Timeline

24. The following sequence and events were led in evidence and is not in dispute. Her father was a police officer and has been somewhat of a strict disciplinarian. Until December 2019, the whole family lived together. Then in December 2019 the mother left for Ba. On the 25<sup>th</sup> April, 2020 the Accused retired from police service. In June 2020 LL faces the second incident. In July 2020 the victim with her second elder sibling after being sworn at by the Accused runs away to Ba. The Accused obtains the Child Recovery Order and attempts to get the children back. However, as the children namely LL and her sibling cried and refused and they were not brought back and left with their mother at Ba. There was an order to bring the children to the Accused during holidays. This was in July, 2020.
25. In October, 2020 as LL happened to stay overnight at a friend's house without informing her mother Lily she was sent back to the Accused and LL returned with her brother to Makoi. Shortly after returning in October, 2020 the Accused being annoyed with LL for not properly cleaning the sink and soiling some washed clothes pushed a chair at her causing a bleeding injury. LL had rushed out of the house and appears to have obtained medical attention and complained to the Nausori Police Station. The Accused was apprehended and remanded for a day and the victim returned to her mother at Ba.
26. It is common ground and admitted by the defence that the Accused did plead guilty and was imposed a short sentence that which was suspended for the said assault. The matter was concluded somewhere between October and December, 2020.
27. The above timeline and sequence of events are not in dispute

### Evaluation of the Prosecution Evidence

28. The entire prosecution case depends on the evidence of PW1 LL. The complaint is belated. LL has disclosed this for the first time to her mother on the 5<sup>th</sup> December, 2020. This is almost 2 years after the alleged first incident and around 6 months after the second incident. The reasons for the delay as adduced from her are that she was living with the

Accused, her mother was married to the accused and she thought that no one would believe. She also said that the Accused did threaten her. The second incident takes place in June, 2020 this too she does not tell anybody.

29. She had an uncle named Warren who was her mother's brother living in the neighbourhood. She had her elder siblings in the house. She has not made any attempt to inform any of them. Her mother was no doubt in Ba at that time. Then in July 2020 LL she runs away to Ba. Thereafter, in October, 2020 she was once again sent back to Makoi by her mother as she spent the night at another house without her mother's permission and had an attitude problem. Her return was to punish or discipline her. When she was so sent back to the Accused's house, LL did not show any reluctance nor did she refuse to return and neither did she at that stage tell her mother of the sexual abuse. When asked she said that as there was another lady with her father in the house and she was not afraid to return. But the fact remains that on the first occasion she was abused when all, including her mother was at home. Hence, another lady being at home would possibly make no difference.
30. After returning she was assaulted and she goes to police station and complains of the assault. She does not disclose of the alleged sexual abuse at that point either. Her explanation is that she was shy and afraid to disclose. May be possible as this was the police station where her father worked. That being so then she returns to her mother and is with her between October 2020 and December 2020. She does not on her own disclose or tell her mother. It is only when her mother was harsh on her for drinking alcohol that a disclosure is made for the first time of sexual abuse. She admits that her father would have been extremely harsh if this matter was brought to his notice. She harboured an extreme anger and hatred for her father as he appears to have been cruel in the extreme and harsh on her. In this background she informs the mother of the previous two incidents of alleged sexual abuse committed by her father.
31. Is it probable and reasonable for a victim of this nature to remain silent for over two years without disclosing? The first incident takes place in January 2019. It was a one-off incident committed by her own biological father when she was a girl of just 13 years. Thus, it is

possible that she may not disclose this to anybody and will opt to remain silent especially in the context of the Fijian patriarchal culture in conjunction with having an extremely strict father and she being under his command and control so to say.

32. That been so she once again is faced with a second incident of abuse in June 2020 and she continues to remain silent. Is this conduct probable that could be expected of LL? After the second incident in in June 2020, in view of her father swearing at her in July 2020, LL and her sibling ran away to Ba where her mother was. She had many an opportunity, reason and occasion to tell her mother with whom she was living at Ba after the second incident. She does not do so.
33. When her father swore at her in July 2020, LL ran away to Ba. When she was assaulted by her father in October 2020 she did go to the police and complain. In this backdrop it appears that LL by the year 2020 October was quite a bold and was psychologically strong so as to lodge a complaint on her own against her father. This shows that by the middle of 2020 she was quite strong minded and not naive and helpless to that extent. Therefore, if she was subjected to sexual abuse during June 2020, she appears to have had the courage and ability to complain. She did not do so.
34. In December 2020 the allegation of rape is disclosed when she was caught red handed consuming alcohol and being disciplined by her mother. The possibility of she being returned to her farther may have been looming in her mind. The defence suggested that this story of abuse was coined to mitigate the possible consequences she may have to face in view of her misconduct of drinking alcohol. Prior to this she had without the permission of her mother spent a night and was punished for that by sending her back to her father. By this time LL was a rebellious young teenager. In these circumstances there are two possible inferences that arise. Firstly, fearing further abuse if sent back to her father she may have disclosed the past incidents of abuse. Secondly, it may be an imaginary or a false allegation of abuse made to gain sympathy and mitigate her misconduct and so that will not have to face the wroth and punishment of the father if she is sent back.

35. The defence suggested that her mother Lily fabricated this allegation to enable her to return to Makoi if the Accused was remanded. It is in evidence that the Accused had a de facto partner living in that house and as it was his family house. Thus, there was no question of Lily just walking into that house. It was suggested that when the Accused was locked up in the police for the assault incident as well as when remanded for the rape incident Lily called the police and the Remand Centre and inquired if she could move into Makoi house. This suggestion is not probable for the simple reason if a false allegation was made the Accused would never agree for her to move in to Makoi. Thus, the suggestion and the defence position that Lily was behind the fabrication is highly improbable. Certainly, on a consideration of the totality of the evidence I am convinced that her mother Lily did not fabricate this allegation.
36. In a criminal matter when more than one inference is possible from the proved circumstances what is in favour of the accused should be preferred. One of the inferences is that this may be a false implication to save herself. It is not that I disbelieve LL. It is just that in view of the circumstances and the sequence of events in context, there looms the possibility of LL fabricating a false allegation. In view of the immediate past conduct and her justifiable anger and hatred towards her father it appears that she may have the inclination and the reason to make such a false allegation. Hence, the inference and the possibility that LL may have made a false allegation cannot be excluded.
37. Thus, the allegation made by her may be true as well as may be also fabrication. In a criminal case of this nature the benefit of any doubt of this nature should accrue to the Accused.

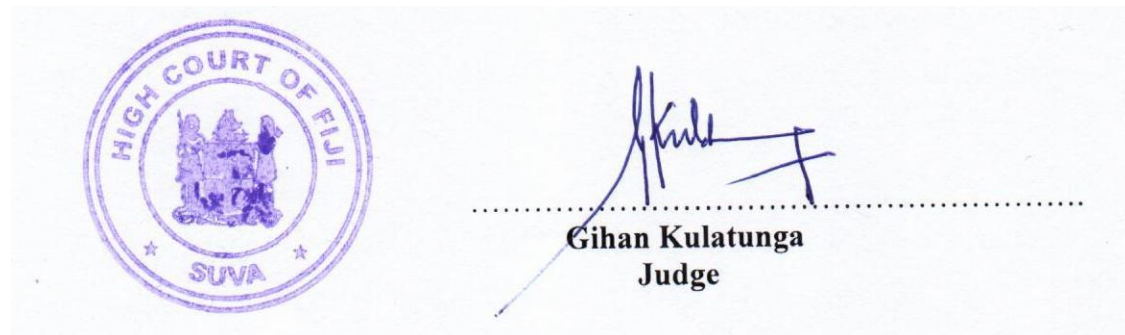
### Conclusion

38. The proof of the charge depends solely on the evidence of the LL. For the reasons stated above, her evidence becomes unsafe to act on because there appears to be a possible reason to falsely implicate the accused at least as a way out for the victim. This is further compounded by the fact of her returning to Makoi to her father in October 2020 without any reluctance or resistance. There is no reasonable explanation as to why the act of abuse

were not revealed and concealed at that stage. The combined effect of the said circumstances is the inference that she may not be truthful and may have uttered the allegation of abuse as a means to an end considering the predicament, she was in. Thus, it is to my mind unsafe to rely on this evidence.

39. It is possible that the accused may have committed the alleged act and simultaneously there is the possibility that the said allegation may also be false. This is a classic instance of a reasonable doubt. This court does not even for a moment find that the accused did not commit the act as alleged, but it is just that there is a reasonable doubt as to whether he actually did it. For these reasons I hold that the prosecution has failed to prove the charges beyond reasonable doubt.

40. Accordingly, the accused is hereby acquitted.



**At Suva**

24<sup>th</sup> March 2023

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused