

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 205 of 2019

STATE

V

EMINONI SENABAU

Counsel : Mr. Alvin Singh for the State
Mr. Shivendra Nath for the Accused

Dates of Trial : 26-28 & 31 October 2022

Closing Submissions : 5 December 2022

Judgment : 13 April 2023

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "AE".

JUDGMENT

[1] As per the Amended Information filed by the Director of Public Prosecutions (DPP), the accused above-named is charged with the following offence:

Count 1

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

EMINONI SENABAU, between the 14th day of January to the 20th day of April 2019, at Rakiraki, in the Western Division, had carnal knowledge of **AE**, a child under the age of 13 years.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 4 days. Thereafter, the Learned Counsel for the State and Defence made their closing submissions.

The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Decree (Act)—

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

- [5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act.

- [6] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

- [7] Section 207(2) of the Crimes Act is reproduced below:

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

[8] Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic legal euphemism (synonym) for sexual intercourse. In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile-vaginal sexual intercourse with that other person or having sexual intercourse whereby the man penetrates his penis into the vagina of the woman.

[9] In terms of Section 206 (5) the term carnal knowledge is said to include sodomy or anal sexual intercourse as well.

[10] Therefore, in order to prove the first count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this instance between 14 January 2019 and the 20 April 2019);
- (iii) At Rakiraki, in the Western Division;
- (iv) Penetrated the vagina of the complainant AE, with his penis;
- (v) At the time the complainant AE was a child under the age of 13 years.

[11] To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offence.

[12] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[13] The fourth element involves the penetration of the complainant's vagina, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

[14] The final element is that at the time of the incidents the complainant was a child under 13 years of age. The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As would be seen later in this judgment, the complainant in this case was 12 years at the time of the alleged incident of Rape, and therefore, she had no mental capacity to give consent. [Her date of birth being 15 June 2006].

[15] Count 1 is also titled as a Representative Count. Section 70 (3) of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act") provides as follows:

When a person is charged with any offence of a sexual nature and the evidence points to more than one separate acts of sexual misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of a sexual nature occurred.

In such a case the charge must specify in the statement of offence that the count is a representative count.

[16] Therefore, as per legal terminology a representative count is based on an act or series of acts said to be done by the accused during the specified time period as stated in the said charge. In this instance, the prosecution is expected to prove just one incident of Rape, which falls within the period stipulated in the said charge. They need not prove a continuous or a series of incidents of Rape in support of a representative count.

[17] It must also be noted that in terms of Section 129 of the Criminal Procedure Act, it is stated that no corroboration of the complainant's evidence is necessary to prove an offence of a sexual nature; Rape is obviously considered as an offence of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

The Admitted Facts

[18] Section 135 of the Criminal Procedure Act deals with “Admission of facts”. The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

[19] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

1. IT IS ADMITTED THAT the accused in this case is EMINONI SENABAU (*hereto referred as the accused*), 69 years (DOB: 05/12/50), Farmer of Matawailevu Village, Nalawa, Rakiraki.
2. IT IS ADMITTED THAT the accused level of education is up till class 8.
3. IT IS ADMITTED THAT the accused is married to Litiana Kaukiwaqa and they have three children from the marriage.
4. IT IS ADMITTED THAT the complainant in this case is AE (*hereto referred as the Complainant*), student of Matawailevu Village, Nalawa, Rakiraki.
5. IT IS ADMITTED THAT the complainant’s date of birth is 15th June 2006.
6. IT IS ADMITTED THAT the complainant’s parents are Vereimi Koro and Tulia Salawaqa.
7. IT IS ADMITTED THAT the complainant has another younger sister by the name of Naomi Tinani.
8. IT IS ADMITTED THAT the accused and the complainant are related.

9. IT IS ADMITTED THAT on 21st August 2019, the complainant was medically examined by Dr. Emele Bolakoro of Nanukuloa Health Centre.

[20] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

Case for the Prosecution

[21] The prosecution, in support of their case, called the complainant (AE), Dr. Emele Bolakoro and the complainant’s father Vereimi Koro, in that order.

[22] The prosecution also tendered to Court the copy of the complainant’s Birth Certificate as Prosecution Exhibit PE1 and the Medical Examination Report of the complainant as Prosecution Exhibit PE2.

[23] Evidence of the complainant AE

- (i) *The complainant’s evidence was recorded over a period of 2 days. Her evidence was recorded in a ‘closed court’.*
- (ii) *The complainant testified that she was 16 years of age and was residing at Matawailevu Village, Nalawa in Rakiraki. She is a vocational student at Ra High School, studying cookery.*
- (iii) *She confirmed that her date of birth was 15 June 2006. Her date of birth is also an admitted fact. The complainant’s Birth Certificate was tendered to Court as Prosecution Exhibit PE1.*
- (iv) *The witness said that she has been residing at Matawailevu Village, Nalawa, Rakiraki since childhood. She resides there with her parents. Her father’s name is Vereimi Koro. As per the admitted facts, it is stated that the complainant’s parents are Vereimi Koro and Tulia Salawaqa. However, later in evidence it transpired that her biological mother had passed away and that her father had married Tulia Salawaqa. It is a further admitted fact that the complainant has another younger sister by the name of Naomi Tinani.*
- (v) *The complainant testified that she studied at Nalawa Central Primary School.*
- (vi) *The witness said that she knows the accused Eminoni Senabau. She has known the accused for about 5 years. She said he is her grandfather and she addresses him as ‘Bubu’ (grandfather). They reside together in the same village- Matawailevu Village. The accused’s house and her house are located close to each other. The witness said the two houses are situated about 15 – 20 metres apart. Her relationship with the accused had been good.*
- (vii) *The complainant testified to the incidents which happened in the first school term of 2019. She said: “On the first occasion he was calling from outside the window of my room. He was telling me to accompany him to his house. We*

went to his house. The house was empty. No one was there. He said for me to go to his room. The lights in the sitting room was on. He said for us to go to the room. For me to go and take off my clothes. I did not take off my clothes but he took it off. After that he told me to lie on the bed. When I looked at him, he was also taking off his clothes. After that he laid on top of me. Soon after he lay on top of me, he took out his penis. He starting touching my breasts and then he licked my vagina. Then he inserted his penis into my vagina.”

- (viii) For penis the witness used the iTaukei term “yaya vakaturaga”, and for vagina she used the iTaukei term “yaya vakamarama”.
- (ix) When asked for how long the accused was inserting his penis into her vagina, the witness said, it was not long and that after a little while he pulled it out (from her vagina). When asked how she knew that he had inserted his penis into her vagina, the witness said, “When I was looking at him, he was touching his penis”.
- (x) The complainant confirmed that at the time the accused laid on top of her, that she was lying face up.
- (xi) The complainant said that the time the accused was calling her from outside the window, it was between 4.00 and 5.00 in the morning. She had been sleeping in her room at the time. Her house is made of corrugated iron and the windows to her room are made up of louvers. The accused had been knocking the window and calling her. When she had woken up and looked towards the window, she had seen the accused standing outside.
- (xii) When she opened the window and spoke to the accused, the accused had been calling her to go to his house. The witness said: “I told him it was almost daylight-he kept insisting for us to go to his house”. The accused had pulled her hand to take her to his house. She said: “He pulled my hand from inside our house to go to his house.”
- (xiii) The complainant said that at the time her father was at work. He was working as a Security Officer at Ra High School. Her younger sister was sleeping in the other room.
- (xiv) When asked why she had gone with her grandfather that morning, the witness said that he had showed her \$5.00 and asked that they go together.
- (xv) The witness confirmed that there was no one else present at the accused’s house at the time. She had been at the accused’s house for about half an hour. She said the accused had given her the \$5.00. When asked when the accused had given her the money, she said: “After we slept together”.
- (xvi) The complainant said at the time she had been wearing a skirt, a t-shirt and a panty. The accused had been wearing a long pants/trousers and a shirt.
- (xvii) The complainant said she had not informed anyone about what the accused had done to her since he had told her not to tell anyone. When she returned home after the incident, her sister had been still sleeping and her father had not returned home from work.

- (xviii) *The complainant testified that two weeks after the first incident a similar incident had happened again. She said: "He (Eminoni) did the same thing that he did to me before". She explained further: "On the second occasion he came to call me. He was calling from outside the window. When I looked towards the window I saw him. He again told me for us to go to his house. We went to his house. When we reached his house, there was no one there. We went to his room. He told me to undress for us to stay together. After that, we slept together".*
- (xix) *When asked what she meant by 'sleep together', she said to stay together and later she said to have sexual intercourse (veiyacovi). The witness said that in the bedroom the accused had touched her breasts and her vagina. He had been touching his penis. After that he had laid on top of her. He took out his penis and inserted it into her vagina.*
- (xx) *This incident too had taken place in the early hours of the morning. At the time only her younger sister was at her home and her father was at work. When she returned home she had not informed anyone about what the accused had done to her since the accused had told her not to tell anyone.*
- (xxi) *The complainant testified to a third incident which took place. This incident had taken place one week after the second incident. When asked to explain what happened, the witness said: "He (Eminoni) again came and called me from the window. Said for us to go and sleep together. And we went to his house. When we reached his house there was no one there. We went to his room. He told me to lay down on the bed. He said for us to undress. And he took off my clothes. And he said for us to lay down on the bed. He started touching my breasts and vagina. After that he undressed and laid on top of me. He told me to touch his penis. Then he laid on top of me and touched me. After we slept together he told me to put on my clothes and go home".*
- (xxii) *The complainant explained that by 'sleep together' she meant to have sexual intercourse (veiyacovi). Later she said to use his penis in her vagina. The accused had been on top of her for about 15 seconds. At the time she was lying face up.*
- (xxiii) *When asked if she had informed anyone about this third incident the witness said: "No. Only my aunt caught him (Eminoni) calling from the window". The witness explained further that this was after their cell group service (church service) on a Thursday in the year 2019. The witness said she could not recall the exact date or month. She said her aunty's name is Livia Yanuyanutawa.*
- (xxiv) *The following questions were then asked from the witness and she answered as follows:*

Q. *How long after the third incident did your aunt catch the accused calling you from the window?*

A. *After having our intercourse she caught him on Thursday afternoon.*

Q. *Were you present when your aunty caught him?*

A. *I was inside the house when he was calling from the window.*

Q. *What transpired?*

A. *My aunty went to look for my father.*

Q. *Did she manage to look for your father?*

A. *Yes. They both came home.*

Q. *When they came home what happened?*

A. *My father came. Grandfather Eminoni hid behind the kitchen. Father came into the house and asked me if grandfather Eminoni was calling from the window. I told him yes that he was calling from the window when I was changing my clothes. Then my father went to look for him beside the kitchen. He was not there. And he went to look for him in his house.*

Q. *When your father asked about Eminoni, did you tell your father of what he did to you?*

A. *No.*

Q. *After that time at any point of time did you tell your father of what Eminoni did to you?*

A. *Yes.*

Q. *When was this?*

A. *After a month.*

Q. *And what did you tell your father?*

A. *I told my father that he would usually come and call me from our window. Then I told him that he would say for us to go to his house. I told him that we had stayed together.*

(xxv) *The complainant further testified that on her father hearing this he had gone to confront the accused, together with her aunt Livia and herself. They had gone into the accused's house and her father had asked the accused about it. However, the accused kept saying it was all a lie. "Then my aunty told him that she had caught him calling from the window the other day. Grandfather Eminoni kept denying it and kept saying that he was at his house on that day and that he had never come towards our house".*

(xxvi) *Thereafter, her father had decided to report the matter to the Police. The witness did not recall when the matter was reported to the Police.*

- (xxvii) It is an admitted fact that on 21 August 2019, the complainant was medically examined by Dr. Emele Bolakoro of Nanukuloa Health Centre.
- (xxviii) The complainant identified the accused in the dock as Eminoni Senibau.
- (xxix) The complainant was cross examined at length by the defence.
- (xxx) The complainant confirmed that at the time of the first incident (her step-mother) Tulia Salawaqa was not living with them. Only her father and sister were there.
- (xxxi) However, the defence highlighted an inconsistency in her testimony vis-à-vis the history given by her to Dr. Bolakoro at the time of her medical examination, where she has stated as follows: "In the morning her mother woke her up again to get ready for school".
- (xxxii) Although the witness admitted to saying this to the doctor during her examination, she denied that her mother was at home on the night of the first incident.
- (xxxiii) The complainant agreed that it was her aunty Livia who had informed her of the term sexual intercourse and this was in August 2019. However, she reiterated that the incidents of sexual intercourse she mentioned in her evidence in chief had taken place during the period 14 January 2019 and 20 April 2019.
- (xxxiv) The complainant agreed that the accused is married and has a wife and children. However, she denied that the accused's wife and children were at his house at the time of the first incident.
- (xxxv) She said she was not aware that the accused was working as a Security Officer in the year 2019 in Lautoka. It was suggested to the witness that the accused was not present in the village during the period 14 January 2019 and 20 April 2019. The witness denied this suggestion and said that he was present.
- (xxxvi) It was suggested to the witness that the incident (as alleged by her) did not happen at all. The witness denied this suggestion and said it happened. It was also suggested that these allegations were made up by her Aunty Livia in August 2019 and not by her. The witness denied this suggestion.
- (xxxvii) The following questions were then asked from the witness and she answered as follows:

Q. My client's instructions are that it is you who went to his house in the month of August 2019?

A. No.

Q. This was 4.00 a.m to 5.00 a.m sometimes in the month of August 2019?

A. Yes.

Q. And you went to his house on your own free will in the month of August 2019?

A. No.

Q. *At the time you went to the accused's house you had a boy accompanying you in the morning?*

A. *No.*

Q. *And you started knocking on his door?*

A. *No.*

Q. *My instructions are that when you went to the accused's house he took you to your own house in the morning after seeing you with a boy in the early hours of the morning?*

A. *No.*

Q. *And when the accused took you back to the house your father actually gave you a beating for roaming around with a boy in the early hours in the morning in the month of August 2019?*

A. *No.*

Q. *I suggest to you that only after that was this matter reported to the Police?*

A. *No.*

Q. *I also suggest to you that that is why you have made up these allegations against my client?*

A. *No.*

Q. *I also suggest to you that despite having numerous opportunities from April to August 2019, you reported the matter because you were caught with a boy at night?*

A. *No.*

.....

Q. *And the reason you didn't share the alleged incident with your father was because he was strict with you?*

A. *Yes.*

Q. *So that is why when you were found with a boy in the village in the month of August 2019, you went and reported the matter to the Police?*

A. *No.*

(xxxviii) During her cross-examination, the witness clarified that the second incident happened one week after the first and the third incident two weeks thereafter

(during the evidence in chief, she had stated that the second incident happened two weeks after the first, and the third incident one week after the second).

(xxxix) It was also suggested to the complainant that she brought this matter up against the accused because she and her father are not from the Matawailevu Village. The complainant denied this suggestion.

(xl) The complainant was questioned about the statement made by her at the Nalawa Police Station, on 21 August 2019.

(xli) The Defence highlighted the following omission in the testimony given in Court by the witness vis a vis her statement made to the Police on 21 August 2019:

Although in her testimony in Court the witness had stated that after going to the accused's house in August 2019, that the accused had accompanied her to her house, she had made no mention of this fact in her statement made to the police.

(xlii) It was again suggested to the complainant that at the time the accused came to her house he had informed her dad that she had come to his house accompanied by a boy. It was also suggested that this was the reason why she had not informed this fact to the Police. The complainant categorically denied these suggestions.

(xliii) In re-examination, the State Counsel attempted to clarify from the witness certain answers given by her in cross examination.

(xliv) The complainant was asked to clarify the inconsistency in her evidence whereby she had informed the doctor who had examined her that in the morning her mother (step-mother) woke her up again to get ready for school. The complainant explained that after the incident happened her mother had arrived the next morning (from Vanua Levu). She had woken her up to get ready for school.

[24] Evidence of Dr. Emele Bolakoro

(i) The Doctor testified that she is currently serving as a Medical Officer at the Nausori Health Centre. She is 32 years of age.

(ii) She had graduated with an MBBS Degree from the Fiji School of Medicine in 2014. Thus she has been practicing as a Medical Officer for the past 8 years.

(iii) The witness said that after graduation she served as a Medical Intern at the Lautoka Hospital for 1 year. From 2016 to 2020 she was a Medical Officer at the Nanukuloa Health Centre in Ra. She has been based at the Nausori Health Centre since 2020.

(iv) The witness said she had obtained a Post-graduate Diploma in Public Health from the Fiji National University in September 2022.

(v) The witness testified that she had conducted the medical examination on the complainant, AE, at the Nanukuloa Health Centre, on 21 August 2019, at 2.02

in the afternoon. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE2.

- (vi) The witness confirmed that the date of birth of the complainant (as recorded in PE2) was 5 June 2006 (should be 15 June 2006). Thus at the time of examination the complainant was 13 years old.
- (vii) The history given by the patient has been written separately by the doctor in an A4 paper and attached to the report.
- (viii) The Doctor testified as to the specific medical findings as found in column D12 of the Medical Examination Report. Upon examination no obvious injuries have been noted in the private area (genital area). The doctor stated that the female private area was the area below the hip. She has drawn a diagram/rough sketch of the female private area at Appendix 1.
- (ix) A whitish, thick precipitate or fluid was noted inside the vaginal fornix. She testified that vaginal fornix means basically the wall of the vagina. The doctor explained that this could be a normal vaginal discharge or sign of infection.
- (x) Furthermore, she has noted that the hymen was not visualized. Meaning the hymen was not present. The hymen is a piece of tissue found at the opening of the vagina. The doctor testified that in her professional opinion any penetrating trauma to the vagina can cause this or even any strenuous activity such as riding a bicycle or riding a horse.
- (xi) As to her professional opinion as found in column D14, the doctor has noted that there are no obvious injuries and/or lesions noted. The doctor explained that given the history the findings were not very conclusive or definite. The findings did not provide any straight forward reasons whether there was sexual intercourse or not. Thus she testified that the findings were inconclusive.
- (xii) However, the doctor confirmed that if the accused were to lie on top of the complainant and penetrate her vagina it could result in the hymen not being present. She stated that even if a flat penis (weak penis) is inserted into the vagina the hymen could be broken or ruptured.
- (xiii) In cross-examination the doctor confirmed that she cannot say with certainty that if any sexual intercourse had taken place, that the said penetration actually happened between 14 January 2019 and 20 April 2019.

[25] Evidence of Vereimi Koro

- (i) The witness testified that he is 53 years of age. He is residing at Matawailevu Village, in Ra. He is working as a Security Officer at the Ra High School.
- (ii) The witness said that he has been residing at Matawailevu Village for more than 50 years.
- (iii) He said he is married to Tulia Salawaqa. He has no children through that marriage. Tulia is originally from Bua, in Vanualevu.

- (iv) *He has two daughters – the complainant and her sister Naomi Tinani. The mother of his two daughters is Rusila Rasea who has passed away. He couldn't recall how long ago she had passed away. However, the complainant was said to be 6 years old at the time.*
- (v) *The witness said that the complainant is now 16 years of age and her younger sister Naomi Tinani is in Class 7 (12 years of age).*
- (vi) *The witness said that he is no longer married to his wife, Tulia. He said: "We are not staying together now. Because every day of my pay day when she takes the money (money for food ration), she runs away". He said that he is separated from his wife Tulia since last year.*
- (vii) *He has been working as a Security Officer at the Ra High School since October last year (2021). Prior to that he had been working at Nawairuku Investments which is the company involved in construction work.*
- (viii) *The witness testified that he had reported this matter to the Police on 21 August 2019 (his statement was shown to refresh his memory). At the time he had been doing some work as a house carpenter in the village and also as a plumber.*
- (ix) *The witness said that his house in the village is his own house. There are two bedrooms and one sitting room. In the year 2019, one bedroom was occupied by the complainant and the other by himself and his daughter Naomi. There are three doors to the house and eight windows made out of louver blades.*
- (x) *The witness testified to the incident which transpired on 20 August 2019. That afternoon he was drinking grog at one of his uncle's residence (Lepani Delanivalu). The grog session had finished after 9.00 p.m. When the grog finished his uncle had given him money to go and buy some more grog from Eroni Vunisa's house. While returning after buying the grog, he had met Livia (his cousin sister and his neighbour). Livia had told him that the accused Eminoni was knocking at his house for the complainant to open the house. Livia had said that she had seen Eminoni enter his house.*
- (xi) *The witness had returned home and asked his children about what Livia had told him. They had confirmed that Eminoni had come home. Thereafter, he had gone outside the kitchen which was located just outside the house. He had seen the accused standing at the back of the kitchen wearing a shorts and a t-shirt with his flip flop on his hand (holding on to his flip flop). At the same time Livia had come and flashed the light on her phone. From that light he had clearly seen that it was the accused who was standing there. The accused had been 'shocked' to see the witness.*
- (xii) *When the accused had been asked what he was doing there he had said that he was looking for a man in a pullover. The witness had told the accused to go back to his house and he had complied. The witness had proceeded to his uncle's house to continue drinking grog.*
- (xiii) *The witness testified that the next morning he got an opportunity to talk to the complainant. He had told her to tell him everything that had happened the*

night before as he is her father. The complainant had said that the accused had come home and asked her to open the door and to come outside. She had not told him anything else.

- (xiv) The witness said that the same morning he had gone to the Chief's house (The village Chief) to inform him of what happened. He had advised to report the matter to the police.*
- (xv) Accordingly, this matter had been reported to the police on 21 August 2019.*
- (xvi) The witness said that the accused Eminoni was his uncle.*
- (xvii) The witness denied that in the month of August 2019 the accused came with the complainant to report to him that she had been seen with a boy late in the night. He also categorically denied that he had punished or beaten the complainant due to this fact.*
- (xviii) The witness was cross-examined by the defence.*
- (xix) The witness was asked as to why he had raised this matter with the Matanivanua (Chief's Spokesperson) and the Tui Nalawa (The Chief). The witness said that that was the village law. That you cannot go and knock or call at a house when only the children are at home and not the parents. The witness agreed that therefore, only the village law had been broken.*
- (xx) It was suggested to the witness that the accused had brought the complainant home around 4.00 or 5.00 a.m. on 21 August 2019. The witness totally denied this suggestion and said that it was a lie. It was further suggested that because of this he had got really angry with the complainant and had beaten her. The witness denied this suggestion. It was again suggested to the witness that this incident was brought out only because the accused had brought the complainant to his door step between 4.00 and 5.00 a.m. on 21 August 2019. The witness again denied this suggestion.*
- (xxi) It was further suggested to the witness that during the period 1 January 2019 to the end of April 2019, that the accused was not in the village and that the only people living in his house was his wife and children. The witness first said that he cannot recall and later he said that the accused was in the village during the period. The witness testified further that at the time the accused was looking after his grandchildren in the village.*

[26] At the end of the prosecution case Court decided to call for the defence of the accused. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[27] The accused decided to testify on his own behalf.

Case for the Defence

[28] Evidence of Eminoni Senabau

- (i) *The witness testified that he is 72 years old and currently residing at Field 40, New Sub-Division, Lautoka. He is unemployed.*
- (ii) *The witness said that he is originally from Matawailevu Village, from the province of Ra, where he was born.*
- (iii) *The witness testified that from January 2019 to April 2019 he was working as a Security for a businessman named Ramesh, who was doing business in Suva. The witness was the caretaker of his house and looking after his compound in Field 40, Lautoka. Later the witness said that he had been working in this capacity from December 2018 to April 2019.*
- (iv) *When asked what his usual hours of work was the witness said that he worked for 24 hours every day.*
- (v) *During this period from December 2018 to April 2019 his wife, son and two granddaughters (his eldest daughter's children) had been residing at this house in Matawailevu Village. The witness said that he did not come to the Matawailevu Village during this period.*
- (vi) *The witness said that he had only returned to the village in May 2019.*
- (vii) *The witness testified that he is related to the complainant through his brother. The complainant's father's step-father is his brother. Therefore, he is the complainant's grand uncle.*
- (viii) *The witness was asked as to where he was on the night of 20 August 2019. He said he was at home in the village. His wife and his grandchildren had been at home. Around 4.00 to 5.00 a.m. the next morning, he had woken up to help his grandchildren in cooking. At that time he had heard a knock on the window. So he had opened the door.*
- (ix) *On opening the door, he had seen Vereimi Koro and his wife. They had inquired from him whether the complainant was sleeping inside his house. He had said no and asked them what was wrong. They had told him that when they went to check the complainant's room she had not been there. Vereimi and his wife had then left.*
- (x) *The witness testified that a while later, he had heard another knock and had opened the door. On opening the door he had seen the complainant and her boyfriend. The complainant had said that she had wanted to come and sleep in his house. On seeing the complainant he had spoken harshly to her and told her that her father had been looking for her and that she should go straight home. When the complainant's friend had seen him talking to her, he had run away.*
- (xi) *Since the witness was wanting to go and buy eggs for his granddaughters, he had accompanied the complainant back to her house. Then he had called Vereimi and said that the complainant was here and that she was out with her*

boyfriend. The witness said that Vereimi had immediately called the complainant into the house.

- (xii) The witness said that on his way back to his house (after buying the eggs) he had passed Vereimi's house. He could hear Vereimi beating the complainant and repeatedly asking her as to who the boy (she was with) was. The witness said that he had gone into Vereimi's house and told him to stop beating the complainant. "I told him if he wanted to know the truth of the matter that he should report it to the Police. The Police will look for the boy and inform. After I told him that, he told me to be quiet or he will punch me".
- (xiii) The witness was asked about the evidence led by the prosecution that he was standing beside the kitchen of Vereimi's house in the night of 20 August 2019. The witness answered as follows: "That is my right as a member of the village. I was standing beside the kitchen. There is Vereimi's house. The toilet is outside and then there is the kitchen. It is true I was standing beside the kitchen but it was not in his compound".
- (xiv) The witness totally denied the allegations made by the complainant that he had penetrated her vagina with his penis between 14 January 2019 and 20 April 2019, on three separate occasions. He said: "In my view may be because I had exposed her secret that she had a boyfriend for the whole village to know. That is why she came up with this allegation".
- (xv) The witness stated further that in the village community he was the Matanivanua (Chief's spokesman). The complainant and her family were always jealous of him because he had a higher position than them. Further the witness said that all his children are well educated and have good jobs compared to the complainant's family.
- (xvi) The witness was cross-examined at length by the Learned Counsel for the State and prosecution case theory was put across to him. However, the witness consistently denied the allegations made against him by the complainant.
- (xvii) The prosecution highlighted the following inconsistencies in the testimony given in Court by the witness vis a vis his statement made under caution to the Police on 22 August 2019:

1. In his testimony in Court, the witness said that from January 2019 to April 2019 he was working as a Security for a businessman named Ramesh, in Field 40, Lautoka. However, in his statement made to the Police, it is recorded as follows (at Question and Answer 53):
Q. Do you wish to say anything?
A. Between the 1st term of school that is stated there I was working in Lautoka for a month and I cannot recall.

2. It transpired during the course of the testimony that between 14 January 2019 and 20 August 2019, that he had asked the

complainant's father to allow the complainant to accompany him to go to Rakiraki town. During the cross-examination the witness said that was in 2018.

However, in his statement made to the Police, it is recorded as follows (at Question and Answer 36):

Q. It was alleged that you went to ask AE from her dad to take her to Rakiraki, what can you say to that?

A. Yes I asked her from her father.

Analysis

[29] As stated before, the prosecution, in support of their case, called the complainant (AE), Dr. Emele Bolakoro and the complainant's father Vereimi Koro, in that order. The accused decided to testify on his own behalf.

[30] The burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove all the elements of the charge beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove at paragraph 10 of this judgment.

[31] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.

[32] Based on the said admitted facts it is admitted that the accused and the complainant are related to each other and they both resided at the Matawailevu Village, in Rakiraki. Therefore, the identity of the accused is not in dispute, as he was well known to the complainant.

[33] It is an admitted fact that the complainant's date of birth is 15 June 2006. Thus at the time of the incidents alleged, the complainant was only 12 years old, and a child under the age of 13 years. At the time she testified in Court she was 16 years of age.

[34] Therefore, the primary issue of dispute in this case is the physical act, namely whether the accused penetrated the vagina of the complainant AE, with his penis.

[35] I have summarized the evidence of all witnesses led during the trial.

[36] The accused totally denies all the allegations made against him by the complainant. The defence position is that during the period of the alleged offending, which is between 14 January 2019 and 20 April 2019 that he was not in the village. The accused has stated that during this time he was working in Lautoka.

[37] The accused also takes up the position that the reason why the complainant has made these allegations against him was due to the fact that on one night in the month of August 2019, the complainant had come to his house with a boy and had wanted to sleep at his place that night. He states that he had not allowed her to do so and instead taken her back to her place and informed her father that the complainant had been roaming about in the night with a boy. The accused has further testified that the complainant's father had even beaten her due to this fact.

[38] During the course of the trial the accused took up an alibi that during the period of the alleged offending, which is between 14 January 2019 and 20 April 2019 that he was not in the Matawailevu Village, but working in Lautoka. However, no notice of alibi has been given by the defence in terms of the provisions of Section 125 of the Criminal Procedure Act.

[39] Section 125 (1) and (2) of the Criminal Procedure Act is reproduced below:

(1) On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

(2) A notice under this section shall be given —

(a) within 21 days of an order being made for transfer of the matter to the High Court (if such an order is made); or

(b) in writing to the prosecution, complainant and the court at least 21 days before the date set for the trial of the matter, in any other case.

[40] This case against the accused was filed in the High Court as far back as 27 November 2019. The matter was taken up for trial almost three years later. At no time during this period did the accused notify Court that he is taking up the defence of alibi.

[41] Therefore, Court cannot accept his alibi evidence as true and cannot give any weight to such evidence.

- [42] Furthermore, it must also be borne in mind that the complainant in this case is not merely complaining of an isolated incident or a single act. Here the complainant has testified to a sequence of events or a series of acts which the accused perpetrated on her, on three separate occasions, in the first school term of 2019 (between 14 January 2019 to 20 April 2019). Therefore, it is the opinion of this Court that it is highly unlikely for the complainant, who was merely 12 years old at the time, to make up or manufacture such a sequence of events against the accused, unless the incident really took place.
- [43] Therefore, considering the totality of the evidence in this case, it is my opinion, that the defence version of a total denial cannot be accepted as truthful and reliable, and as such, I reject the defence version.
- [44] As stated previously, the complainant in this case has clearly testified to the manner in which the accused had penetrated her vagina with his penis on three separate occasions, in the first school term of 2019. Although only 16 years of age at the time of her testimony, the complainant withstood the rigorous cross examination by the defence and remained consistent throughout her evidence. It is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable.
- [45] The complainant's father, Vereimi Koro, was the recent complaint witness. He testified that in the morning (on 21 August 2019) he got an opportunity to talk to the complainant. He had told her to tell him everything that had happened as he is her father. The complainant had said that the accused had come home and asked her to open the door and to come outside. She had not told him anything else at the time.
- [46] This clearly qualifies as a recent complaint. It is trite law with regard to recent complaint evidence that the complainant need not specifically disclose all of the ingredients of the offences and describe every detail of the incidents, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. I am satisfied that the complainant made a proper complaint in this case. Accordingly, I consider that her credibility is strengthened in view of that recent complaint.
- [47] I must emphasize that I have borne in mind that the recent complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of

the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[48] The Defence attempted to impeach the complainant's credibility during her cross examination by stating that the complainant did not complain of the incidents immediately as it happened.

[49] I agree that the complainant only reported the matter to her father on 21 August 2019 and only thereafter was the matter reported to the Police.

[50] However, this Court is conscious of the fact that children do not always react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned.

[51] The complainant has clearly testified to the reasons for not reporting the matter to anyone earlier. The witness testified that she did not tell anyone about what had happened because the accused had told her not to inform anyone about the incidents. I am satisfied with the complainant's explanation for the delay in reporting the matter.

[52] The defence also attempted to impeach the complainant's credibility by highlighting one inconsistency in her testimony vis-à-vis the history given by her to Dr. Bolakoro at the time of her medical examination and one omission in her statement made to the Police on 9 January 2021, in comparison to the testimony given by her in Court. I have identified and made reference to the said inconsistency and omission when summarizing the complainant's evidence.

[53] In *Sivoinatoto v. State* [2018] FJCA 68; AAU0049.2014 (1 June 2018); the Fiji Court of Appeal discussed as to how a Court should deal with issues arising out of contradictions and omissions.

[54] I am of the opinion that the complainant has given a satisfactory explanation with regard to the said inconsistency and omission and as such the reliability and credibility of the complainants' evidence remains unaffected.

[55] The prosecution also led the evidence of Dr. Emele Bolakoro. The copy of the Medical Examination Report pertaining to the medical examination conducted by her on 21 August 2019, at the Nanukuloa Health Centre in Ra, was tendered to Court as Prosecution Exhibit PE2.

[56] However, it must be conceded that the medical evidence in this case is not conclusive proof of evidence of penetration. It must be also borne in mind that this medical examination on the complainant had been conducted nearly 4 months after the period of alleged offending.

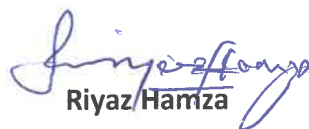
[57] The Doctor has testified that even if a flat penis or a weak penis (a penis that is not fully erected) is inserted into the vagina of a female that the hymen could be broken or ruptured. In any event, in terms of the law, the slightest penetration is sufficient to satisfy the element of penetration. This element is complete on penetration to any extent.

[58] Therefore, having analysed all the evidence in its totality, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charge of Rape.

[59] In the circumstances, I find the accused guilty of the charge of Rape.

[60] Accordingly, I convict the accused of the charge of Rape.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 13th Day of April 2023

Solicitors for the State: Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused: Nath Lawyers, Attorneys-At-Law, Lautoka.