

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 20 of 2022

STATE

V

INOSI NOA MATAKIBAU

Counsel : Ms. S. Swastika for the State.
: Ms. K. Vulimainadave and Mr. B. Makanjee for
the Accused.

Dates of Hearing : 03, 04, and 05 July, 2023
Closing Speeches : 06 July, 2023
Date of Judgment : 07 July, 2023

JUDGMENT

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

1. The Director of Public Prosecutions charged the accused by filing the following information dated 23rd March, 2022:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

INOSI NOA MATAKIBAU on the 10th day of February, 2022, at Velovelo, Lautoka, in the Western Division, penetrated the vagina of “N.N”, a child under the age of 13 years, with his finger.

SECOND COUNT

Statement of Offence

ATTEMPTED RAPE: Contrary to section 208 of the Crimes Act 2009.

Particulars of Offence

INOSI NOA MATAKIBAU on the 10th day of February, 2022, at Velovelo, Lautoka, in the Western Division, attempted to penetrated the vagina of “N.N”, a child under the age of 13 years, with his penis.

THIRD COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1) (a) (i) of the Crimes Act 2009.

Particulars of Offence

INOSI NOA MATAKIBAU on the 10th day of February, 2022, at Velovelo, Lautoka, in the Western Division, unlawfully and indecently assaulted “N.N”, a child under the age of 13 years, by licking her vagina.

2. In this trial, the prosecution called four witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for all the offences as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

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

ELEMENTS OF THE OFFENCE

RAPE

5. To prove the first count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his finger;
 - (c) “N.N” was below the age of 13 years.
6. The slightest of penetration of the complainant’s vagina by the accused’s finger is sufficient to satisfy the act of penetration. As a matter of law a

person under the age of 13 years does not have the capacity to consent. In this case, the complainant was 9 years at the time of the alleged offending and therefore the consent of the complainant is not an issue in regards to this count.

7. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
8. The second element is the act of penetration of the complainant's vagina with the finger.
9. The final element of the offence is the age of the complainant. It is an undisputed fact that the complainant was 9 years in 2022 which establishes that she was below the age of 13 years at the time of the alleged incident.
10. In this trial, the accused denied committing the offence of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his finger.
11. This court must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for this court to find the accused guilty of this count. If on the other hand, this court has a reasonable doubt with regard to any of those elements concerning the offence, then this court must find the accused not guilty.

ATTEMPTED RAPE

12. To prove the second count the prosecution must prove the following elements of the offence of attempted rape beyond reasonable doubt:

- (a) The accused;
 - (b) Attempted to penetrate the vagina of the complainant with his penis.
13. In this trial the accused has denied committing the offence of attempt to commit rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had attempted to penetrate the vagina of the complainant with his penis.
14. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
15. The second element is the attempt to penetrate the complainant's vagina by the penis. This element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental.
16. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental. For the accused to be guilty of attempted rape, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.
17. This court will have to look at the conduct of the complainant and the accused at the time and the surrounding circumstances to decide this issue.
18. Before the accused can be found guilty this court must be satisfied beyond reasonable doubt of two things:-

- (a) Firstly that the accused intended to penetrate the vagina of the complainant with his penis;
 - (b) Secondly with that intention the accused did something which was more than mere preparation for committing that offence.
19. In this case, the prosecution is alleging that the accused intended to penetrate the vagina of the complainant with his penis. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. This court will have to decide intention by considering what the accused did, by looking at his actions before, at the time of, and after the act.
20. The accused has denied committing the offence of attempted rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to penetrate the complainant's vagina with his penis and with that intention he did something which was more than merely preparatory.
21. The prosecution says the accused lied to the complainant that he will be taking her to the hill top to pick guavas. Instead he took the complainant to her grandmother's cassava plantation. The accused cleaned an area asked the complainant to lie down and remove her panty and then he took out his penis and slid it in a downward manner on her vagina.
22. If the above is accepted by this court that the accused did this, then it is for the court to decide whether what the accused did went beyond mere

preparation. In other words, did he actually intend to commit the offence of rape, in which case he is guilty of attempting to commit rape, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.

23. If this court is satisfied that the prosecution has proved all the above elements beyond reasonable doubt then the accused is guilty of attempt to commit rape.
24. If on the other hand, this court finds that the prosecution has failed to prove any of these elements beyond reasonable doubt then this court must find the accused not guilty of attempt to commit rape.

SEXUAL ASSAULT

25. To prove count three the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant by licking her vagina.
26. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed this offence.
27. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.

28. The final element of assault is the unlawful use of force on the complainant by licking her vagina.

In this regard this court has to consider:

- (a) whether the force used in licking the complainant's vagina was sexual in nature; and
 - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
29. In this trial, the accused has denied committing the offence of sexual assault. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by licking her vagina.
30. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offence of sexual assault as explained above, then this court must find the accused guilty. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then this court must find the accused not guilty.
31. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

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

PROSECUTION CASE

34. The complainant informed the court that in the year 2022 she was a year 5 student living at Velovelo, Lautoka with her younger sister and her parents. Her date of birth is 1st October, 2012. The birth certificate of the complainant was marked and tendered as prosecution exhibit no. 1.
35. The complainant knows the accused who is also known as Bau. The accused was her neighbour living on the hill top and her house was a bit at the bottom. She used to go to the accused house with her sister to watch movies.
36. One day the complainant and her younger sister Nani went to pick some guavas at the pastor's plantation. The complainant and her sister climbed a guava tree and were picking the guavas when the accused came and joined the two girls in picking guavas. At this time he told the complainant that he was looking for her and that they could go to the hill top and pick

more guavas. Nani wanted to come with them but the accused stop Nani by saying that there were dogs at that place.

37. At this time Nani went away the complainant further said the accused lied to her because instead of taking her to the hill top the accused took her to her grandmother's cassava plantation.
38. The accused cleaned a portion of the cassava patch and he told the complainant to lie down on the ground which she did facing up. The accused then told the complainant to remove her panty which she did as well. Thereafter the accused spread the complainant's legs and licked her vagina for a short while. When the complainant was lying down the accused was on his knees.
39. Thereafter the accused put his finger in her vagina whereby the fingertip went inside. The accused finger was shaking when he was doing this. According to the complainant the accused finger went a bit inside her vagina but not right inside.
40. Thereafter the accused took out his ball meaning his penis and slid it downwards on her vaginal area. The complainant left after pulling down her dress and wearing her panty she went to the house of Mereoni who is her neighbour. The complainant lied to Mereoni that the accused had slapped her. According to the complainant she was scared and shaking she did not tell Mereoni about what the accused had done to her because Mereoni was not alone but with other children. From here the complainant ran to her grandmother's house she saw her grandmother and aunt Litiana.

41. The complainant started crying so she asked her aunt Litiana to go into a room because she was scared and there were other children in the house. In the room the complainant told her aunt the accused had licked her vagina. The complainant recognized the accused in court.
42. In cross examination the complainant stated that Nani is her cousin sister and the accused house was about four houses away from her house. She agreed when she was on the guava tree when the accused came and started picking guavas and then he said he was looking for her.
43. Upon further questioning the complainant said it was true the accused took her to her grandmother's plantation licked her vagina, put his finger below the place where she urinates and had slid his penis on her vaginal area. The complainant denied her aunt Litiana had told her to say what she was telling the court.
44. The complainant denied she had lied in court and at the police station and that she was the one answering the questions asked by the police officer and not anyone else. The complainant also denied that the accused had left after giving her and Nani the guavas.
45. The second witness Mereoni Ravua informed the court that on 10th February, 2022 she was at the house of her uncle. During the day the complainant and three other children came running and told her that they were going to pick guavas. The witness told her daughter and Ulamila not to go with the complainant and Nani. After a while the complainant came running the witness observed that the complainant was in a shock, looked scared and was crying. The complainant was on the road and Mereoni had to stop the complainant after seeing her distressed state.

46. The witness asked the complainant what happened and sat her down so that the complainant could catch her breath. The complainant said the accused had slapped her mouth at the place where they were picking guavas.
47. Upon hearing this, the witness took the complainant and left her at her grandparents house and then she went to look for the accused. The witness knows the accused who stays in the same settlement, when Mereoni confronted the accused with the allegation he denied.
48. The third witness Litiana Adi Rauqali informed the court that on 10th February, 2022 she was at home cleaning her bedroom when she heard the complainant crying so she went into the living room. The complainant is her niece who used to come to the house of the witness and play with her two children.
49. The witness saw the complainant looked scared so she asked the complainant what happened. The complainant said the accused had slapped her mouth at the farm. The witness could not believe it because the complainant kept crying so she asked the complainant again what happened the complainant again said the accused had slapped her at the farm. At this time all the children in her house had gathered around the complainant.
50. The witness told the children to leave, the witness took the complainant into her bedroom and asked her again "*what had happened why are you crying*". It was at this time the complainant said that the accused had harassed her at the farm and touched her private part.

51. The witness got angry because she could not believe the accused would do such a thing to her niece. The witness knows the accused she informed her in laws, the complainant's father also came and then the matter was reported to the police.
52. In cross examination the witness said at the police station the complainant was taken inside and later the witness was called to sit in during the statement taking.
53. The police officer was asking the complainant questions in English and all the answers were given by the complainant. The witness stated that she did not tell the complainant what to tell the police. The witness did not believe the complainant that the accused had slapped her at the farm because the complainant was shivering and crying. It was in her bedroom the complainant told the witness the accused had done something to her.
54. In re-examination the witness clarified that the complainant was answering to the police officer in English and Itaukei language.

RECENT COMPLAINT DIRECTION

55. Complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

56. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that the complainant told Mereoni and Litiana immediately after the incidents that the accused had slapped her.
57. It was only after Litiana took the complainant away from the living room into her bedroom that the complainant told Litiana the accused had harassed her and touched her private part.
58. This is commonly known as recent complaint evidence. The evidence given by Mereoni and Litiana is not evidence of what actually happened between the complainant and the accused since they were not present and they did not see what had happened.
59. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant did not tell the truth to Mereoni and Litiana in the first instance because there were children around. She was at ease when Litiana took the complainant into her bedroom away from everyone and then she told Litiana some of the things the accused had done to her.
60. The prosecution is asking this court to consider the age of the complainant and the fact that she relayed relevant and important information about the conduct of the accused to Litiana which shows she is more likely to be truthful.
61. On the other hand, the defence says the complainant is a liar who admitted lying in court she made up a story against the accused. She gave one version to Mereoni repeated the same version to Litiana and another

version in court. The defence also states that this court should consider that there are different versions before the court which shows the complainant was making up a story against the accused and therefore she should not be believed.

62. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is for this court to decide whether the complainant is reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.

63. The final witness Dr. Salome Daunivalu informed the court that she graduated with an MBBS degree from the Fiji School of Medicine in 2010. She has served the Ministry of Health in different hospitals and centres. From 2021 she has joined Medical Services Pacific. The witness also has graduated with a Post Graduate Diploma in Public Health.

64. On 11th February, 2022 the witness had examined the complainant at the Medical Services Pacific. The Fiji Police Medical Examination Form of the complainant dated 11th February, 2022 was marked and tendered as prosecution no.2.

65. The medical findings of the witness were:
 - (a) Hymen injuries - abrasion and tear of 0.5cm x 1cm at 7 o'clock position;
 - (b) Hymen was red and swollen;
 - (c) Abrasion noted at the left labia which was tender to touch;

(d) No bleeding or discharge noted.

66. The witness stated that she had illustrated her findings at appendix 1 she explained that an abrasion was loss of skin from the surface which could be caused by a blunt trauma or injury to the skin particularly soft tissue injury, scratching or frictional force.
67. Taking into consideration the injury seen the witness stated that the injuries were definitely consistent with a blunt force sexual in nature. As a result of inflammation arising from the injury the hymen was red and swollen.
68. In cross examination the witness said the hymen was intact, there was no bleeding but there were injuries. Upon further questioning the witness said a hymen is a membrane that covered the vaginal opening.

DIRECTION ON EXPERT EVIDENCE

69. This court has heard the evidence of Dr. Daunivalu who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.
70. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my

conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.

71. This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.
72. This was the prosecution case.

DEFENCE CASE

73. At the end of the prosecution case, the accused was explained his options. He chose to remain silent but he called one witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent. This court must consider the evidence of the defence witness and give such weight as is appropriate.
74. The daughter of the accused Luisa Pickering informed the court that on 10th February 2022 she had gone with her father to the cassava plantation at midday before lunch. On her way to the cassava patch she saw the complainant coming from the guava tree with her sister.
75. At the cassava plantation the witness helped her father pull out some cassava they went home and then to the place where the funeral was taking place to give the cassava.

76. In cross examination the witness agreed she would not know the exact time she had gone to the cassava plantation. The witness agreed she could not remember what the complainant was wearing that day. When it was put to the witness that the reason why she does not remember what the complainant was wearing was because she never saw the complainant that day, the witness disagreed and said that she saw the complainant before going to the cassava patch and that she was not lying in court.
77. This was the defence case.

ANALYSIS

78. The prosecution alleges that on 10th February, 2022 the complainant who was 9 years of age and her younger sister went to a nearby plantation to pick some guavas. After sometime the accused who is known to the complainant came and told her that he will take her towards the top end of the plantation where there were more guavas.
79. The complainant's sister wanted to go with them but the accused told the complainant's sister to go home since there were dogs at the place where they were going. Instead of taking the complainant to the place the accused had mentioned he had taken the complainant to her grandmother's plantation. The accused cleaned the area and told the complainant to lie down and remove her panty. The complainant did as she was told.
80. The accused spread the legs of the complainant and started licking her vagina thereafter he penetrated the vagina of the complainant with his finger. According to the complainant the finger did not go right inside her vagina but the fingertip had penetrated her vagina. The accused did not

stop there he then slid his penis in the vaginal area of the complainant under the urinary tract to her vagina.

81. After this the complainant ran towards her home crying, shocked and scared on the way she met her neighbour Mereoni. The complainant did not tell anything about what the accused had done to her because there was many children around so she lied to Mereoni that the accused slapped her. From there the complainant went to her grandmother's house where she met her aunt Litiana. The complainant when questioned by her aunt twice said that she had been slapped by the accused.
82. The reason why the complainant did not also tell anything to Litiana was because there were children around her. Upon noticing this Litiana took the complainant to her bedroom it was here the complainant told Litiana the accused had harassed her and touched her private part.
83. The state also submits that Mereoni and Litiana saw the distressed state of the complainant in fact Litiana had her doubts on whether the accused had indeed slapped the complainant after watching the distressed state of the complainant. The matter was reported to the police the next day and the complainant was medically examined.
84. Finally, the examining doctor had seen that there were recent injuries in the genitalia of the complainant particularly in the left labia and the hymen membrane which was also red and swollen had a tear of 0.5 cm x 1cm. In the opinion of the doctor the injuries were caused by blunt force trauma.
85. On the other hand, the defence says the allegations are lies and a made up story the accused did not do anything to the complainant as alleged. What the complainant narrated in court was not possible and/or probable.

86. When the complainant met Mereoni she lied that the accused had slapped her. This was lie number one, the complainant was under no threat by anyone so what was the reason to lie. The second lie was in a matter of minutes this time to her aunt Litiana once again there was nothing for the complainant to lie about, the accused was not around yet she repeated herself in saying the accused had slapped her.
87. The defence further submits that the accused had been accommodating the complainant in his house from a long time and no allegations had been raised against him by the complainant. The accused daughter Luisa had looked after the complainant whenever she came to his house.
88. The accused did not do anything as alleged there was a funeral in the settlement and he was busy in the funeral. Before lunch the accused with his daughter Luisa had gone to the plantation and pulled out some cassava for consumption at the funeral. Luisa had seen the complainant and her sister going past her. Furthermore, the medical report of the complainant is not conclusive since the injuries seen could be self-inflicted.
89. Finally, the defence submits that what the complainant told the court does not make sense and is riddled with doubt. The defence is asking this court not to believe the complainant who has a habit of lying but to believe the defence of complete denial. Luisa gave a frank and honest account of what had happened that day and more so that Luisa had accompanied the accused to the cassava plantation and Luisa had seen the complainant leaving the plantation.

DETERMINATION

90. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
91. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a consistent and clear account of what the accused had done to her, she was also able to withstand cross examination and was not discredited. The complainant was steadfast in what the accused had done to her.
92. I accept that the complainant had lied to Mereoni and Litiana, however, this lie cannot be taken in isolation one has to take into account the following:
- a) The distressed state of the complainant at the time;
 - b) There were other children around Mereoni and Litiana at the time hence the reluctance by the complainant to speak about the sexual conduct of the accused in front of the other children.
93. In my considered judgment this reaction by the complainant to Mereoni and Litiana was a normal occurrence the circumstances of the complainant is an important consideration in this regard. She had just come out of an unexpected ordeal and was running away. The complainant was, however, able to tell her aunt Litiana what the accused had done to

her in her aunt's bedroom after the children surrounding the complainant were sent away by Litiana.

94. At this time the complainant freely told Litiana about some of the things the accused had done to her. Although what the complainant told Litiana was not in much detail she did express important facts about what the accused had done to her.
95. I accept the observations of Mereoni and Litiana that the complainant was crying, shocked, scared and in a distressed state as reliable and credible narration of what they had seen. I also accept the evidence of Litiana as credible when she told the court about what the complainant had told her.
96. It is not expected of a 9 year old girl who has just had an unexpected sexual encounter to tell the first person she meets everything about what had happened to her in the presence of others. The failure by the complainant to tell Mereoni and Litiana anything in the first instance about what had happened to her does not affect the reliability of her evidence.
97. Furthermore, experience has shown that individuals differ in terms of how they react towards people after an unexpected happening. Some display obvious signs of distress and some not. The fact that the complainant did not tell anything to Mereoni and Litiana in the first instance about what the accused had done to her does not mean that she was a liar and she should not be believed. The circumstances of the complainant ought to be considered holistically. It cannot be ignored that the complainant was a child of 9 years at the time who was oblivious to an unexpected conduct by the person she knew.

98. The complainant struck me as a simple, shy and reserved person who would not have openly spoken to Mereoni and Litiana about what the accused had done to her in front of the other children. The fact that the complainant narrated crucial information to Litiana about what the accused had done to her in private in my considered judgment was enough to alert Litiana that something bad had happened to the complainant.

99. The Supreme Court in *Anand Abhay Raj vs. The State, CAV 0003 of 2013 (20th August, 2014)* at paragraph 39 made an important observation about the above as follows:

The complainant need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.

100. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. It is not expected of anyone who has had an unexpected sexual encounter to give every detail of the accused unlawful sexual conduct to the person the complaint is relayed to.

101. In this case the complainant had relayed crucial information to Litiana that the accused had done something to the complainant and no doubt Litiana immediately acted upon the complaint by reporting the matter to the police.

102. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty. I also accept the opinion of the doctor that the injuries seen in the vaginal area of the complainant

was consistent with blunt force trauma which supports the evidence of the complainant that there was forceful penetration of a finger in her vagina. I reject the defence contention that the injuries could have been self-inflicted is an afterthought lacking any credence. Although the complainant was confused in regards to the biological/medical terms to explain the reproductive organs such confusions are understandable for anyone who is not medically conversant. In this case the complainant was a 9 year old child.

103. The Court of Appeal in *Vilikesa Volau v State* [2017] FJCA 51; AU0011.2013 (26 May 2017) at paragraph 14 made a pertinent observation in respect of the above as follows:

... It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

103. I accept the evidence of all the prosecution witnesses as reliable and credible.

104. On the other hand, I reject the defence of complete denial by the accused as not plausible on the totality of the evidence. I do not believe the defence assertion that the accused had not done anything to the complainant as unworthy of belief. The evidence of Luisa was not relevant to the defence strategy. In any event Luisa was not sure or certain of the time she had seen the complainant and her sister run past them. Luisa gave a narration of events which was contrary to the line of cross examination of the

complainant by the defence counsel that the accused was at the scene and after giving the complainant guavas he had left.

105. Luisa had carefully thought what she wanted to say which was to show that the accused was with her and not as alleged by the complainant. I do not give any weight to her evidence. The defence has not been able to create a reasonable doubt in the prosecution case.

LESSER OFFENCE

106. I have also directed my mind to the lesser offence of sexual assault in count two which is of attempted rape. The law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard, I direct myself that if this court finds the accused not guilty of attempt to commit rape then it should consider the lesser offence of sexual assault.
107. I have once again carefully examined the evidence of the complainant in respect of this count and I am satisfied that considering the evidence before, at the time of and after what the complainant told the court it is evident that the accused intended to penetrate his penis into the vagina of the complainant. The accused by taking out his penis sliding it on the vagina after making the complainant lie down and asking her to remove her panty supports the fact that what the accused did was more than merely preparatory. In the circumstances, this court is satisfied beyond reasonable doubt that there is evidence to sustain the charge of attempt to commit rape.

CONCLUSION

108. This court is satisfied beyond reasonable doubt that the accused on 10th February, 2022 had penetrated the vagina of the complainant with his finger, attempted to penetrate the vagina of the complainant with his penis and finally he unlawfully and indecently assaulted the complainant by licking her vagina a child under the age of 13 years.
109. In respect of the offence of attempt to commit rape the accused had intended to insert his penis into the vagina of the complainant and by sliding his penis on the vaginal area of the complainant what he did was more than merely preparatory. In respect of the offence of sexual assault in the third count this court is also satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse in what he did to the complainant. The act of the accused has some elements of sexuality and indecency that any right minded person would consider such conduct sexual and indecent in nature.
110. In view of the above, I find the accused guilty of one count of rape, one count of attempted rape and one count of sexual assault as charged and he is convicted accordingly.
111. Before I leave I would like to express my appreciations to the state counsel for providing the complainant the aid of a doll and a picture to assist in explaining what she wanted to tell the court. The use of such aid is helpful in understanding what a child witness wishes to express.

112. This is the judgment of the court.




Sunil Sharma

Judge

At Lautoka

07 July, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.