

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 13 of 2020

STATE

V

LIVAI QORAQORA BUEBOTO

Counsel Mr. Taitusi Tuenuku for the State
Ms. Losana Taukei with Mr. Alifereti Waqavakatoga for the
Accused

Dates of Trial 9-12 May 2023
Closing Submissions 17 May 2023
Judgment 1 August 2023

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

JUDGMENT

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

COUNT 1

Statement of Offence (a)

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

Particulars of Offence (b)

LIVAI QORAQORA BUEBOTO, on the 4th day of January 2020, at Sigatoka, in the Western Division, unlawfully and indecently assaulted **MN** by touching her breast and kissing her on the lips.

COUNT 2

Statement of Offence (a)

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

Particulars of Offence (b)

LIVAI QORAQORA BUEBOTO, on the 4th day of January 2020, at Sigatoka, in the Western Division, penetrated the vagina of **MN** with his fingers, without her consent.

COUNT 3

Statement of Offence (a)

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

Particulars of Offence (b)

LIVAI QORAQORA BUEBOTO, on the 4th day of January 2020, at Sigatoka, in the Western Division, had carnal knowledge of **MN**, without her consent.

- [2] The accused pleaded not guilty to the three charges 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 Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act; one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act, and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

[6] The first count against the accused is a charge of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The offence of Sexual Assault is defined in Section 210 (1) of the Crimes Act as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person; or

(b)

[7] Therefore, in order to prove the first count of Sexual Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance on the 4 January 2020);
- (iii) At Sigatoka, in the Western Division;
- (iv) Unlawfully and indecently assaulted MN, the complainant, by touching her breast and kissing her on the lips.

[8] To further elaborate upon these elements in relation to the first count. 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 offence.

[9] The second element relates to the specific date on 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.

[10] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for Court to consider and decide whether the touching of the complainant’s breast and kissing her on the lips by the accused, is an indecent act and thereby amounts to Sexual Assault.

[11] The second count against the accused is a charge of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act; while the third count is a charge of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

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

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

[13] 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.

[14] 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.

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

[16] Section 207 (2) (b) makes reference to a person penetrating 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. In the instant case, the accused has been charged in count 2, for penetrating the vagina of the complainant with his fingers.

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

- (i) The accused;
- (ii) On the specified day (in this instance on the 4 January 2020);
- (iii) At Sigatoka, in the Western Division;
- (iv) Penetrated the vagina of the complainant MN, with his fingers;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[18] Similarly, in order to prove the third count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance on the 4 January 2020);
- (iii) At Sigatoka, in the Western Division;
- (iv) Penetrated the vagina of the complainant MN, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

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

[20] The second element relates to the specific date on which the offences were committed. The third element relates to the place at which the offences were committed. The prosecution should prove these elements beyond reasonable doubt.

[21] The fourth element involves the penetration of the complainant's vagina, with the accused's fingers (in respect of count 2) and the penetration of the complainant's vagina, with the accused's penis (in respect of count 3). 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 fingers and penis, respectively, to any extent.

[22] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his fingers (in respect of count 2) and that the accused penetrated the complainant's vagina, with his penis (in respect of count 3), without her consent.

[23] It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[24] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his fingers (in respect of count 2) and that the complainant did not consent for the accused to penetrate her vagina, with his penis (in respect of count 3); the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who

Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[25] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 17 years at the time of the alleged incidents of Rape, and therefore, she had the mental capacity to give consent. [Her date of birth being 12 August 2002].

[26] 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 and Sexual Assault are obviously considered as offences 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 Agreed Facts

[27] 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.

[28] Accordingly, the prosecution and the defence have consented to treat the following facts as "Agreed Facts":

1. The accused is Livai Qoraqora, 42 years old at the time of alleged offending of Naviyago, Sigatoka.
2. The complainant and the accused are cousins.

3. The issue to be determined for Count 1 and Count 3 is consent.

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

Case for the Prosecution

[30] The prosecution, in support of their case, called the complainant (MN), her father Luke Qautoka and Dr. Shymal Nikhil Chand.

[31] The prosecution also tendered to Court a copy of the Medical Examination Report of the complainant as Prosecution Exhibit PE1.

[32] Evidence of the complainant MN

- (i) *The complainant’s evidence was recorded over a period of 2 days. Her evidence was recorded in a ‘closed court’ and a screen was placed so that the complainant could not see the accused.*
- (ii) *The complainant testified that she is currently 20 years old. She is currently residing at Nalebaleba Village, Sigatoka, where she has been residing since birth.*
- (iii) *In the year 2020, she was staying in the same village with her mother (Cema Rabeka), her father (Luke Qautoka), her younger brother (Peceli Batinivatu), her younger sister (Adivika Marama), her uncle (Joave Naboniu) and aunt (Iva Ratu). Joave Naboniu was her dad’s younger brother (uncle). They had been staying in her uncle’s house.*
- (iv) *In 2020, she was 17 years of age and was schooling at Sigatoka Valley Secondary School (in Form 5). At the time, her brother Peceli was 8 years old and her sister Adivika was just 1 year old.*
- (v) *Later in her testimony, the complainant said that Peceli and Adivika were her aunty and uncle’s children. So they were her cousins. Her aunty and uncle had two other children as well, Ana Nuqa and Luke Qautoka (namesake of her father), who were also residing at the house. The complainant was the only child to her parents.*
- (vi) *The complainant testified that her date of birth is 12 August 2002.*
- (vii) *The witness said that the house they were staying in was a concrete house. It was located at Yatagalevu Settlement, which was close to the Nalebaleba Village. Initially the complainant said that the distance between the two places was 17 to 18 kms. Later she said it would take approximately half an hour to walk from the settlement to the village.*

- (viii) The complainant said that the house had two rooms. One bedroom was used by her and her cousin siblings, while the other bedroom was used by her aunty and uncle. Her mum and dad used the sitting room.*
- (ix) The complainant testified that her mum and dad are now divorced. However, in 2020, they were still together.*
- (x) Currently her biological mother is not staying with her. The complainant is now staying with her father at Nalebaleba Village (but not at the settlement anymore). Now she is staying with her paternal grandmother. They had moved to this house in 2022.*
- (xi) The complainant said that she knows the accused, Livai Qoraqora. He is her cousin, from her father's side. In the year 2020, Livai was staying at Naviyago Village in Navosa. It is not too far from the Yatagalevu Settlement. By vehicle (van) it does not take an hour to travel between the two places.*
- (xii) The witness testified to the events which took place on 4 January 2020. At around 3.00 p.m., she had been sleeping at her uncle and aunty's house. Peceli and Adivika were also with her at the house. Before she went to sleep, Peceli was using the phone. Adivika and the complainant were sleeping together (on the same bed).*
- (xiii) The complainant said that her mother had gone to the Suva market to sell the farm produce, like cucumber and beans. Her dad went down to Kulukulu to repair his van. Her uncle and aunty had also gone to Suva with her mother. Her cousins Ana and Luke had also accompanied them. They had left at 9.00 p.m. the night before (the witness said it was on Thursday night). Usually when her mum, uncle and aunty leave on Thursday night to Suva, they would return on Saturday night.*
- (xiv) The witness said: "While I was sleeping, I was lying in my bedroom with Adivika. I was shocked to see a huge person standing beside my bed inside my room. I woke up and saw this huge person..... It was Lindo".*
- (xv) When asked as to whom she referred to as Lindo, the complainant said it was Livai, the accused.*
- (xvi) The complainant testified that Livai had pulled the pillow that she was covering her face with. This is the time she had woken up and seen Livai standing beside her. Livai had asked her where her mum was. She had told him that her mum went to Suva. The witness further testified that while Livai was speaking she could smell liquor in his breath and knew he was drunk.*
- (xvii) Livai had then gone outside the bedroom. The complainant had then laid down again to sleep. She was facing upwards. Peceli had been in the sitting room playing games on the phone. Her cousin Adivika was sleeping beside her on the bed.*
- (xviii) The following questions were then asked from the witness and she answered as follows:*

Q. What happened after you laid down to sleep?

- A. *He again entered my bedroom.*
- Q. *When he did so again, were you still sleeping?*
A. *I was trying to sleep – my eyes were closed.*
- Q. *Then how did you know he came back to the bedroom?*
A. *I can hear his footsteps coming towards my room.*
- Q. *What happened after you heard his footsteps?*
A. *I woke up.*
- Q. *What did you see?*
A. *I see him (Livai).*
- Q. *Now where was he?*
A. *He was standing beside my bed.*
- Q. *What did you do?*
A. *He then asked me who is the boy that I have a relationship with.*
- Q. *Did you tell him anything?*
A. *Then I replied to him that my boyfriend is overseas. I just made that up.*
- Q. *Why did you do that?*
A. *Since he is my cousin brother, we iTaukei we can joke/we can lie to them.*
- Q. *What happened after that?*
A. *He jumped onto me on top of the bed.*
- Q. *Where was Adivika?*
A. *She was sleeping beside me.*
- Q. *What happened when he jumped on top of you?*
A. *I was trying my best to turn. I found it difficult because he was holding on to me. He was wrapping his hands around me.*
- Q. *Why were you trying to turn?*
A. *I was trying to push him out from me – I was trying to escape.*
- Q. *At the time he jumped on top of you, were you facing upwards or were you facing sideways or down?*

- A. *I was facing upwards.*
- Q. *What else happened?*
- A. *He tried to kiss me. I did not want him to kiss me and I turned around (my head) trying to evade him from kissing me.*
- Q. *So what happened after that?*
- A. *He tried to touch my breast.*
- Q. *How was he able to do that?*
- A. *He sat on me and caressed me.*
- Q. *Was he lying on top you or sitting on you?*
- A. *He was sitting on me.*
- Q. *The first time he jumped on you, did he lie on you or immediately sit on you?*
- A. *He sat on me, then he later lie on top of me.*
- Q. *What was he doing when he sat on you?*
- A. *He was caressing me on my breasts.*
- Q. *Did you like what he was doing to you?*
- A. *No.*
- Q. *What were you doing?*
- A. *I was yelling to my cousin brother Peceli.*
- Q. *How did you do that?*
- A. *I was calling his name – I was yelling his name.*
- Q. *So what happened then?*
- A. *Peceli stood up and saw a huge person sitting on me. Peceli then ran outside – he stood by the window louvre.*
- Q. *Did you see all this?*
- A. *I just saw him ran outside, stood by the window louvre- he pulled the curtain and peeped inside my bedroom. I saw this with my eyes.....I was continuously yelling to Peceli to call for some people and also to call my grandmother. But he left..... I am not aware whether he left or not.*
- Q. *Did you see him leaving?*
- A. *No I didn't see him leave.*

- Q. *When you were yelling (for help) what was Livai doing?*
A. *He tried to take off my singlet (t-shirt).*
- Q. *Did he manage to take off your singlet?*
A. *Yes.*
- Q. *How did he manage to take off your singlet?*
A. *He pulled up my singlet.*
- Q. *Did he pull it right off?*
A. *He pulled it right off.*
- Q. *What did you do when he was pulling your singlet?*
A. *I was lying down.*
- Q. *What happened after that?*
A. *He tried to caress me and touch my breast.*
- Q. *Did he try to do it or did he actually caress you and touch your breast?*
A. *Yes he actually did it.*
- Q. *Was he touching your breast with one hand or both hands?*
A. *With both hands - he was using both hands.*
- Q. *Why didn't you try to push him and run away?*
A. *He was sitting on my feet.*
- Q. *By feet, what do you mean?*
A. *By feet the witness meant thighs (in iTaukei – it can mean feet or legs).*
- Q. *What were you doing?*
A. *I was trying to see my brother Peceli - I was calling out his name.*
- Q. *What happened next?*
A. *He tried to take off my trousers.*
- Q. *Did he try or actually take it off?*
A. *He tried.*
- Q. *How did he try?*
A. *He was pulling one side down, I was pulling the other side up.*

- Q. *Then?*
A. *He tried to hold my hand – he was trying then he actually held my hand.*
- Q. *Which hand did he hold, can you remember?*
A. *My left hand.*
- Q. *What did he do next?*
A. *He got hold of both my hands..... Then he managed to hold me with one of his hands and with his other hand he pulled my trousers totally out.*
- Q. *What did he do next?*
A. *He pulled me down towards the lower part of his body/towards his private part and inserted his private part.*
- Q. *Where did he insert his private into?*
A. *Into my private part.*
- Q. *So what did you do after that?*
A. *He forced himself towards me.*
- Q. *When you say his private part, what do you mean by that?*
A. *I mean his penis.*
- Q. *Where did he insert his penis?*
A. *Into my vagina.*
- Q. *How long was he doing that for?*
A. *Not long because he used force.*
- Q. *Why did you say this?*
A. *Actually it hurts me. It's painful and he is using force – as he is not doing it slowly and he was putting force.*
- Q. *Did you like what Livai was doing to you at this point in time?*
A. *No.*
- Q. *Did you agree to what Livai was doing to you?*
A. *No.*
- Q. *Did he do anything else to you?*
A. *No.*
- Q. *Are you sure about that?*

A. *Yes. He inserted his private part into my private part and he does what men always do.*

Q. *After he had sex with you, what did he do?*

A. *He withdrew his private part and put on his trousers.*

Q. *And then?*

A. *He went outside of my room. He got into a carrier. All in the carrier were drinking with him. They were drunk.*

Q. *What did you do?*

A. *I tried to get hold of my phone which was on top of the shelf to call my dad.*

Q. *Why did you want to call your dad?*

A. *To inform him what happened.*

Q. *Did you get hold of your phone?*

A. *In the meantime Adivika woke up and I asked her to go and bring the phone.*

Q. *Did Adivika bring the phone?*

A. *Yes.*

(xix) *The complainant said that thereafter she tried to call her father but his phone was diverted. Thereafter, she had called her aunty who had gone to Suva for selling of produce. She had told her aunty of what had happened. Her aunty had called her father. Her father had reported the matter to the Sigatoka Police Station in Lawaqa and then returned home.*

(xx) *The witness said that her father had returned home around 5.30 in the evening. She said: "He arrived – he looked at me and burst into tears as I was in a condition that I cannot walk".*

(xxi) *Thereafter, the complainant said that the Police had arrived. The Police had taken her to the hospital. At the hospital she had been examined by a Doctor. Then the Police had taken her to the Lawaqa Police Station. She had been interviewed and her statement was taken. This had been on the same day.*

(xxii) *The witness said that she did not know where Livai had come from before the incident.*

(xxiii) *The complainant was asked as to what she was doing when Livai was having sex with her. She answered: "I was afraid of him. He is a huge person. I told him I will call my dad and complain to him about you".*

(xxiv) *The complainant identified Livai as the accused in the dock.*

- (xxv) *The complainant clarified that the accused had tried to kiss her on her lips. She also clarified that at the time of the alleged incident she was not wearing anything underneath her t-shirt. However, she had been wearing a panty underneath the trousers. When the accused had pulled out her trousers, he had pulled it together with her panty. She said at the time the accused had been wearing a green coloured t-shirt and a ¾ shorts which was blue in colour.*
- (xxvi) *The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant, totally denying the allegations of Sexual Assault and Rape.*
- (xxvii) *It was put to the complainant that before 3.00 p.m. on the day of the alleged incident (Saturday 4 January 2020), that she was hanging clothes outside her house. She denied this suggestion. It was also put to her that while she was doing this the accused was drinking alcohol with a group of men close by to where she was hanging clothes. The witness said: "I didn't see them". It was further suggested to the complainant that while she was hanging clothes, the accused had approached her. She denied the suggestion.*
- (xxviii) *The complainant agreed that the accused was her 'tavale' meaning cousin brother. She agreed that being 'tavale', in accordance with iTaukei custom is someone you will sometimes have a playful relationship with and tease each other. She said only with some 'tavales' and not with all.*
- (xxix) *The following further questions were asked from the witness in cross-examination and she answered as follows:*

Q. *On that specific day you had joked to Livai?*

A. *Yes.*

Q. *Is that something you would usually do with Livai?*

A. *No.*

Q. *It is our instructions that you would often joke to Livai?*

A. *No.*

Q. *It is our instructions that prior to the 4 January 2020, you would joke to Livai and you would say to him in iTaukei, 'Tavale uro levu veitalia ga o karua' (meaning – cousin you are sexy/hot/you look good, never mind you are married/never mind your wife)?*

A. *No. I didn't joke with him. It is him who always jokes with me. I did not say that.*

Q. *It is our instructions that you would also tease him whilst he was walking past you by saying, 'Tavale yato tu ga oqo, meu tacketaki iko wa' (meaning-if you are walking I will come and tackle you down)?*

A. *No.*

Q. *It is also our instructions that prior to 4 January 2020, whilst Livai was riding a horse you had said that you would like to be the horse?*

A. *No.*

Q. *You agree that Livai would also tease you as a 'tavale'?*

A. *Yes.*

Q. *On 4 January 2020, it is our instructions that whilst you were hanging clothes outside your house, Livai approached you and you two started speaking. Livai had asked you in iTaukei, 'Tavale qi vinasi iko' (meaning-cousin I want you/I want to have you)?*

A. *We actually did not meet.*

Q. *It is our instructions that you had replied yes and then you smile?*

A. *No, we even did not meet.*

Q. *It is our instructions that after you had said yes, you and Livai went together into the house and into the room?*

A. *No (the witness categorically said no).*

Q. *It is our instructions that once you and Livai were in the room, Livai then asked you in iTaukei, 'Kerekere qu rawa ni kayagatakinia na gata ni kua' (meaning-please can I use the snake today)?*

A. *No. He did not say that or ask me.*

Q. *Snake is your (clan's) traditional animal?*

A. *Yes.*

Q. *It is also what you would normally refer to as your private part or vagina/penis?*

A. *Yes.*

Q. *It is our instructions that Livai had asked you if he could use your vagina?*

A. *No.*

Q. *It is our instructions that you had replied, is it from your heart?*

A. *No.*

Q. *Livai had then replied yes (it is from the heart)?*

A. *No.*

Q. *It is our instructions that after that you lay on the bed and Livai lay next to you?*

A. *No.*

Q. *Then Livai started caressing your breast with his hands?*

A. *No [State Counsel submitted that this evidence should be taken in the context that the complainant did not agree to this act].*

Q. *It is our instructions that after Livai started caressing your breast, then he took off your singlet (t-shirt)?*

A. *No.*

Q. *Then you agree Livai got on top of you?*

A. *No.*

Q. *You said yesterday (in evidence in chief) that Livai was sitting on your thighs and with both his hands he was touching your breasts?*

A. *Yes.*

Q. *So at that point in time, both your hands were free?*

A. *Yes.*

Q. *You agree that you did not push Livai away?*

A. *I could not do anything because he is a huge person and he is sitting on me.*

Q. *Since both your hands were free, you could have punched him. You agree with that?*

A. *I still cannot do anything because he was sitting on me.*

Q. *Would you agree that the reason you didn't push him or punch him was because you like what he was doing?*

A. *No.*

Q. *It is our instructions that whilst Livai was caressing your breasts, you were caressing his shoulders and his head with your hands?*

A. *No.*

Q. *It is our instructions that whilst all this was happening, you were also making moaning noises?*

A. *No.*

Q. *It is our instructions that you then took off your own trousers along with your panty?*

A. No.

Q. *It is our instructions that after you took off your trousers and your panty you got on top of Livai-whereby you sat on top of him?*

A. No.

Q. *It is our instructions that then Livai inserted his penis into your vagina whilst you were on top of him?*

A. No.

Q. *Our instructions is that you had then moved up and down whilst sitting on his penis?*

A. No.

Q. *It is our instructions that at this point, Livai's hands were on your hips?*

A. No.

Q. *It is our instructions that after a few minutes Livai then turned you on your back and then got up on top of you?*

A. No.

Q. *It is our instructions that whilst he was on top of you, he inserted his penis into your vagina again and moved it in and out for a few minutes?*

A. No.

Q. *It is our instructions that you had liked what Livai was doing and you were making moaning sounds while Livai was doing this?*

A. No.

Q. *It is our instructions that after a few minutes of doing this, Livai withdrew his penis?*

A. No.

Q. *It is our instructions that after he withdrew his penis, he put on his clothes and told you that he will come back later in the afternoon?*

A. No.

Q. *It is our instructions that you had agreed for him to come back later?*

A. No.

Q. *It is our instructions that not at any point when you were having sex with Livai, did you call out for help?*

A. No.

Later when the witness was asked to explain further, she said, 'I really did call for help'.

Q. *I suggest to you that you and Livai had consensual sex and that you had agreed to have consensual sex with him?*

A. *No.*

Q. *I suggest to you that the only reason that you said, Livai had raped you is because Peceli had seen you having sex with Livai?*

A. *The witness initially said that she did not understand this question. Upon further explanation she answered no.*

Q. *I suggest to you that that is the only reason why you reported the matter to the Police?*

A. *No.*

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

(xxxi) The complainant was asked to explain as to when exactly her cousin sister Adivika had woken up from her sleep –whether it was at the time when the accused was having sex with her or whether it was after the accused had sex with her and at the time the witness had asked Adivika to get her phone for her. The witness clarified that her cousin sister Adivika had woken up at the time the accused was having sex with her.

(xxxii) The complainant categorically denied that she had given her consent to the accused to have sex with her. She also denied that she was making up this story because Peceli had seen her having sex with the accused.

[33] Evidence of Luke Qautoka

(i) The witness testified that he is 44 years of age and residing at Nalebaleba Village. He lives there with the complainant, his younger brother, his wife and their children. The complainant MN is his daughter. He is a Farmer by occupation.

(ii) The witness testified that he knows Livai Qoraqora, the accused. He is said to have paternal links to his village.

(iii) In the year 2020, the witness said he was residing at Nalebaleba- at the Yatagalevu Settlement, which was close to the Nalebaleba Village. He was residing at his younger brother's house, together with the complainant, his younger brother, his wife and their children. [Currently they are residing at Nalebaleba Village and not at the settlement].

- (iv) *The witness testified that in the year 2020, he had separated from his wife.*
- (v) *The witness testified to the events which took place on 4 January 2020. He said that around 11.00 a.m. that day he had left home to go to Kulukulu for his vehicle maintenance (his Hiace Minivan). At the time he left home, his daughter MN, and his brother's son Peceli and daughter Adivika were at home. His younger brother and wife had gone to sell produce in Suva.*
- (vi) *The witness said that his younger brother and wife had four children-Peceli, Adivika, Ana and his namesake Luke.*
- (vii) *The witness testified that he arrived at Kulukulu after 12.00 p.m. He had met with his mechanic and they had worked on his vehicle. He said that he was in Kulukulu until the time the call came. He explained that the complainant had called him first. However, since his phone was diverted, she had called the aunty in Suva and the aunty had called him.*
- (viii) *So the call he received while at Kulukulu was from the complainant's aunty. The witness said that after receiving this call he had called the complainant and spoken to her.*
- (ix) *When asked what the complainant had told him, the witness said she had said: "Dad can you please come up quickly. I gotten hurt". The witness had further said that Lindo did something to her. When he had asked what Lindo had done, she said that Lindo had held her and put force on her/applied force on her.*
- (x) *The witness said that on hearing this, he had left immediately to the Lawaqa Police Station (Sigatoka Police Station). The reason he went to the Police Station was because the complainant had said that Lindo had done something to her and he wanted to report the matter.*
- (xi) *After reporting the matter to the Police, he had returned home. When he reached home, he said it was towards sunset. He couldn't recall the exact time.*
- (xii) *Upon arriving home he had met the complainant who was inside the house. She had been crying. On seeing her crying, he had gone close to her and hugged her and asked her how she was. The complainant had answered that she had got hurt. Physically the complainant had looked weak.*
- (xiii) *At the time he arrived home, some of his close relatives were already at home- namely Jone Koroi and the witness's uncle Isikeli Nagede. Jone Koroi was employed as a Policeman at the time.*
- (xiv) *Thereafter, he had taken the complainant to the Sigatoka Hospital together with his elder brother (Tevita Degei). At the hospital, the complainant had been medically examined.*
- (xv) *From the Sigatoka Hospital, they had gone back to the Sigatoka Police Station.*
- (xvi) *The witness identified Livai (who is also known as Lindo) as the accused in the dock.*
- (xvii) *The witness was asked if he had noticed anything else about the complainant physically, when he had met her at home. He said she was sad.*
- (xviii) *In addition to being sad, the witness was asked whether he noticed anything else. He said: "I can see the mark of the blood in the house". When asked to*

explain further, the witness said the blood came from the complainant and was at the doorway from her bedroom to the sitting room.

- (xix) The witness was cross-examined by the defence.*
- (xx) He confirmed that at the time of the incident, his wife too had gone together with his younger brother and his wife to sell produce in Suva. Although he had been separated from his wife at the time and she was not living with him, the witness said that she used to visit.*
- (xxi) The witness also confirmed that he had called the complainant from Kulukulu and spoken to her. On hearing on what had happened to the complainant, he had gone and reported the matter at the Police Station.*
- (xxii) The witness said that when he arrived home after going to the Police Station (the first time), he had been accompanied by his older brother.*
- (xxiii) The witness was asked as to what prompted him to take the complainant to the Sigatoka Hospital. He said that after seeing that the complainant was hurt and in pain he had decided to take her to the hospital.*

[34] Evidence of Dr. Shymal Nikhil Chand

- (i) The Doctor testified that he is currently practicing as a Medical Officer at the Lomawai Health Centre in Sigatoka. He is 30 years of age.*
- (ii) He had graduated with an MBBS Degree from the University of Fiji in 2016. Thus he has been practicing as a Medical Officer for the past 6 years. He has been serving at Lomawai Health Centre in Sigatoka since May 2018. In the year 2020, he was serving at Lomawai Health Centre.*
- (iii) The witness confirmed that he had conducted the medical examination on the complainant, MN, at the Sigatoka Hospital, on 4 January 2020, commencing at 7.40 p.m. The Medical Examination Report of the complainant was tendered to Court as Prosecution Exhibit PE1.*
- (iv) The Doctor stated that the Lomawai Health Centre is under the Sigatoka Hospital. On this particular day, he was on call at the Sigatoka Hospital.*
- (v) It is recorded that at the time of the examination, the complainant's father Luke was present together with WDC Akisi (the Police Officer accompanying the patient).*
- (vi) In the history as related by the person to be examined (column D10 of the Report) it is stated that the patient had revealed that the perpetrator had entered the room at 3.00 p.m. in her house and forcefully raped her for at least 1 hour, after which she revealed the incident to her father.*
- (vii) As to the initial impression of the person to be examined (column D11 of the Report) it is recorded that the complainant was scared but calm during the time of the examination.*
- (viii) The Doctor testified as to the specific medical findings as found in column D12 of the Medical Examination Report. (a) Multiple vaginal abrasions noted. (b) Hymen not intact.*

- (ix) *These findings are further depicted in the diagram at Appendix 1 (page 5 of the Report), where 4 abrasions are shown in clockwise direction at the 3.00 o'clock position, 6.00 o'clock position, 8.00 o'clock position and 10.00 o'clock position, respectively. These abrasions were said to be at the vestibule, which is the opening part of the vagina. He had also noted the presence of semen. The semen was at the top part of the vestibule.*
- (x) *The Doctor explained in detail as to the specific medical findings in column D12. He said that vaginal abrasions are like bruises, but a bit deep in nature and also appear a bit reddish at times. As per Appendix 2 (page 6 of the Report), a bruise has been defined as an injury in which the skin is intact and blood released from damaged vessels remains under the surface; while an abrasion has been defined as a wound in which the surface of the skin is rubbed away by blunt trauma. In laymen's terms, for bruises there is a discoloration in the skin, but no breaks in the skin; while for abrasions the skin is usually not intact and often it can be accompanied with a bit of bleeding as well.*
- (xi) *When asked as to how such multiple abrasions at the vaginal opening can be caused, the Doctor explained that they may be caused by a blunt force or trauma. He further testified that a head of a penis can cause such multiple vaginal abrasions; forceful penetration can cause such multiple vaginal abrasions; and where an accused person aggressively forces his penis into the vagina, it can cause such multiple vaginal abrasions.*
- (xii) *As to his professional opinion as found in column D14 of the Report, it is stated that the injuries appears to be recently acquired with great trauma. The Doctor confirmed that his professional opinion is based on his findings at column D12 (the specific medical findings). Considering the multiple abrasions, a great trauma would be the cause of such multiple abrasions.*
- (xiii) *The Doctor testified that based on the history given by the complainant plus her physical examination, his conclusion was that the history was consistent with what he had found during the examination. His summary and conclusions at column D16 confirms this fact.*
- (xiv) *The medical examination had concluded at 8.10 p.m.*
- (xv) *During cross-examination the Doctor was asked whether in his professional opinion if someone had consensual sex for one hour, could there be similar abrasions. He said it was possible.*
- (xvi) *In re-examination the Doctor clarified that if someone had consensual sex for one hour, it may create initial friction burns, due to the long duration of the intercourse, instead of multiple abrasions. In normal consensual sex, you would not necessarily find multiple abrasions.*
- (xvii) *The Doctor explained further that friction burns are in between a bruise and an abrasion-where the skin maybe reddish and it may have superficial tears as well. Such friction burns may last (or be visible) for a couple of days, because it heals quite quickly.*

- [35] At the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that the accused had committed the offence of Rape of which he is charged with in Count 2. Accordingly, the accused was found not guilty and acquitted of the said charge. The reasons for this decision will be further elaborated upon later in this judgment.
- [36] However, this Court decided to call for the defence in respect of the remaining two counts-Counts 1 and 3. 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.
- [37] The accused decided to testify on his own behalf. He did not call any other witnesses in support of his case.

Case for the Defence

[38] Evidence of Livai Qoraqora

- (i) *The witness testified that he is 47 years old (actually should be 45 since his date of birth is 8 August 1977) and was residing at Naviyago Village in Sigatoka. He has been staying there since birth. He is residing with his wife (Meredani Tuvou) and 8 children and 4 grandchildren.*
- (ii) *It was later revealed in his testimony that the 8 children were biologically his brother's children, whom he considered as his own, since he had married his brother's wife, after his brother had passed away.*
- (iii) *The witness testified to the events which transpired on 4 January 2020. He said he was at home that day clearing the place (the porch) where pumpkin was to be grown. This was around 11.00 a.m. to 12.00 p.m.*
- (iv) *While clearing, his uncle who was driving a carrier stopped in front of his house and asked him to board the carrier. So the witness had boarded the carrier. Thereafter, they had come down to a shop besides the village of Sautabu to do some shopping. His uncle had bought a carton of beer.*
- (v) *Thereafter, they had headed to the Nalebaleba Village. The witness said that in addition to himself and his uncle Vilitati, there was another person named Velei in the carrier at the time. They had reached the Nalebaleba Village around 1.00 p.m. to 2.00 p.m.*

- (vi) *The witness testified that they had drunk the beer at a place called Yatagalevu, where the settlement is. This drinking spot is before reaching the Nalebaleba Village. [So they had reached Yatagalevu between 1.00 p.m. to 2.00 p.m.].*
- (vii) *The witness testified that whilst drinking (about half an hour into the drinking) he had seen his cousin sister MN (the complainant) hanging clothes besides their house. I called out to her 'tavale' (cousin) and greeted her. The place where they were drinking was said to be besides MN's house (near the place where a tree is growing). The complainant had greeted him back.*
- (viii) *Thereafter, the witness said that he had approached MN and had a conversation with her. He had informed her that he wanted her. She had said yes. Thereafter, they had both entered the house and proceeded straight to her room. They had entered through the back door. Soon as you enter was the living room/sitting room. The door leading to the complainant's room was on the right side of the sitting room. The front door was ahead/was in front.*
- (ix) *The witness said that he had seen a child (a boy) who was around 7 to 8 years of age. He had been sitting at the front door looking outside and playing with his phone. The front door had been opened at the time.*
- (x) *Upon reaching the bedroom, he and the complainant had sat on the bed. He had asked the complainant if he could use the 'snake' (a reference to the complainant's private part). The complainant had asked whether it was really coming from his heart. The witness had said yes (meaning coming from his heart).*
- (xi) *The witness said that the size of the bed was about 2 metres in width and a little longer in length. At the time there was another child sleeping on the bed.*
- (xii) *The witness testified that thereafter they both laid on the bed. He had started touching her breasts with both his hands. The complainant still had her clothes on at the time and had started breathing heavily and making moaning sounds. "It was like she liked it".*
- (xiii) *At the time the complainant was lying facing up and he had been lying besides her facing her. He had been touching her breasts for about 4 to 5 minutes. Then he had started pulling up her singlet (t-shirt). It had a round neck. At this point the complainant herself had slowly pulled down her trousers together with her panty. The witness said that by this time he had taken out her singlet and also his clothes. At the time he had been wearing a ¾ trousers (dark blue in color) and a round neck singlet (green in color).*
- (xiv) *Thereafter, the complainant had come on top of him-she had sat on top of him, on his hip (on the lower part of his body). She had then got hold of his private part (his penis) and inserted into her private part (her vagina). He had been using both his hands and holding on to her hip. One of the complainant's hands was on his chest and with the other hand she had been holding his thighs (bracing his thighs). In this position the complainant had been going up and down for about 5 to 6 minutes. At the same time she had making moaning sounds.*

- (xv) *Then the witness had turned her around so that she was facing upwards and he was facing down. The witness continued: "I lied on top of her - I did not lie on her – I braced myself on the bed and I inserted my private part into her private part..... She was lying facing up – I was lying on top of her – but only with the lower part of the body in contact. I did not actually lie on top of her or apply pressure on her".*
- (xvi) *The witness said that his had gone on for around 3 to 4 minutes. At that time the complainant's hands were caressing his ribs, chest, back of his ears and his face. At the same time she had been moaning (making moaning sounds). At the same time the complainant had been saying, "slowly, slowly". He had ejaculated inside her vagina.*
- (xvii) *After ejaculating inside her vagina, he had withdrawn his penis, sat beside the bed and put on his trousers. The complainant had also put on her trousers. He had then thanked the complainant and told her that he will come back in the afternoon.*
- (xviii) *The witness testified that at no time while they were having sexual intercourse had the complainant yelled or called out for help. The child who was on the bed was still asleep.*
- (xix) *Thereafter, he had come outside the house and gone back to the place where his uncle was sitting - where they were drinking earlier. They had finished the left over bottles of beer. He had then boarded the carrier and they had proceeded to Nalebaleba Village. It was around 3.00 p.m. – nearly 4.00 p.m. at the time.*
- (xx) *The witness further testified that after 7.00 p.m. (the same day) he had gone back to the complainant's house to see her. However, there had been no one at the complainant's house at that time. He had then returned back to Naviyago Village.*
- (xxi) *The witness totally denies the allegations made against him by the complainant.*
- (xxii) *The witness was cross-examined at length by the Learned State Counsel and the prosecution case theory was put to him.*
- (xxiii) *It was suggested to the witness that at the time he went to the complainant's house he was aware that the complainant was alone at home, with only her younger cousins, and that he was also aware that there were no adults at home at the time.*
- (xxiv) *It was suggested to the witness that he was quite drunk at the time. However, the witness said that he was not that drunk.*
- (xxv) *It was suggested to the witness that on 4 January 2020, he had sexual intercourse with the complainant without her consent. The witness said that she consented to have sex with him.*

Analysis

- [39] As stated before, the prosecution, in support of their case, called the complainant (MN), her father Luke Qautoka and Dr. Shymal Nikhil Chand. The accused decided to testify on his own behalf.
- [40] The burden of proving each ingredient of the charges 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 charges beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove in paragraphs 7, 17, and 18, of this judgment, respectively, in respect of the three counts.
- [41] 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.
- [42] Based on the said admitted facts it is admitted that the complainant and the accused are cousins. Therefore, they are known to each other. The identity of the accused is not in dispute.
- [43] The complainant's date of birth is 12 August 2002. Thus, at the time of the alleged offending she was 17 years of age. At the time she testified in Court she had turned 20.
- [44] I have summarized the evidence of all witnesses led during the trial.
- [45] During her testimony the complainant did not come out with any evidence in relation to Count 2. In the circumstances, at the end of the prosecution case, this Court decided that there was no relevant or admissible evidence to establish that the accused had committed the offence he is charged with in Count 2. Accordingly, the accused was found not guilty and acquitted of the said charge. However, this Court decided to call for the defence in respect of Counts 1 and 3.
- [46] The complainant clearly testified to the manner in which the accused had entered her room while she was sleeping, and unlawfully and indecently assaulted her by fondling her breasts, on 4 January 2020. She has also testified to the manner in which the accused had sexual intercourse with her without her consent and that he knew or

believed that the complainant was not consenting, or was reckless as to whether or not she was consenting.

[47] The accused totally denies all the allegations made against him by the complainant. The defence position is that the acts of sexual intercourse took place with consent.

[48] It must be emphasized that soon after the alleged incident, the complainant had tried to call her father to inform him about what the accused had done to her. Since she could not get through to her father at the time, as his phone had been diverted, she had then called her aunt who was in Suva at the time and reported the matter to her aunt. Her aunt had then called and informed her father. Accordingly, the matter was reported to the Police promptly.

[49] The complainant's father, Luke Qautoka, was called by the prosecution as the recent complaint witness. He testified as to how the complainant had told him, immediately preceding the incident, that the accused had hurt her and wanted him to come home quickly.

[50] The above 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.

[51] 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.

[52] Furthermore, as per the evidence of Dr. Shymal Nikhil Chand, he has testified that multiple vaginal abrasions were found on the complainant's vaginal area. The medical examination was conducted a few hours after the incident. As to his professional opinion the Doctor stated that the said injuries appear to be recently acquired with great trauma. Considering the nature of the multiple abrasions, the Doctor's opinion was that a great trauma would be the cause for such multiple abrasions.

[53] Therefore, considering the totality of the evidence in this case, it is my opinion, that the defence version cannot be accepted as truthful and reliable and I reject the defence version.

[54] Having analysed all the evidence in its totality, it is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable. The complainant withstood the rigorous cross examination by the Defence and remained consistent throughout her evidence, in relation to the material particulars of this case.

[55] It must also be mentioned once again that in terms of the provisions of Section 129 of the Criminal Procedure Act, where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; although in this case the medical evidence clearly supports the prosecution case.

[56] Considering the nature of all the evidence before this Court, 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 charges of Sexual Assault and Rape with which the accused has been charged.

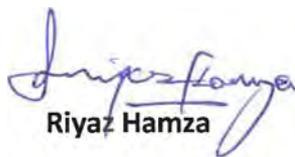
[57] In the circumstances, I find the accused guilty of the first count of Sexual Assault and third count of Rape with which he is charged.

[58] Accordingly, I convict the accused of the first count of Sexual Assault and third count of Rape with which he is charged.



AT LAU KA

Dated this 1st Day of August 2023


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

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

Solicitors for the Accused: Office of the Legal Aid Commission, Lautoka.