

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 123 of 2021

STATE

V

ASWAK ALI

Counsel : Mr. Joeli Nasa for the State

Ms. Benazir Muhammed with Ms. Shaneez Shafique for the
Accused/Juvenile

Dates of Trial : 4-5 October 2023

Closing Submissions : 12 October 2023

Judgment : 7 November 2023

The name of the complainants are suppressed. Accordingly, the first complainant will be referred to as "RM" and the second complainant will be referred to as "RAD".

JUDGMENT

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

COUNT ONE

Statement of Offence

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

Particulars of Offence

ASWAK ALI, between the 1st day of January 2018 and the 31st day of December 2018, at Nadi, in the Western Division, unlawfully and indecently assaulted **RM** by rubbing the anus of **RM** with his penis.

COUNT TWO

Statement of Offence

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

Particulars of Offence

ASWAK ALI, between the 1st day of October 2021 and the 28th day of October 2021, at Nadi, in the Western Division, unlawfully and indecently assaulted **RM** by rubbing the anus of **RM** with his penis.

COUNT THREE

Statement of Offence

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

Particulars of Offence

ASWAK ALI, between the 1st day of April 2020 and the 30th day April 2020, at Nadi, in the Western Division, penetrated the mouth of **RAD**, a child under the age of 13 years, with his penis.

REPRESENTATIVE COUNT

COUNT FOUR

Statement of Offence

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

Particulars of Offence

ASWAK ALI, between the 1st day of October 2021 and the 28th day October 2021, at Nadi, in the Western Division, penetrated the mouth of **RAD**, with his penis, without his consent.

- [2] The accused/juvenile pleaded not guilty to the four charges and the ensuing trial was held over 2 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] At the very outset, it must be stated that the accused/juvenile's date of birth is 30 April 2002 [This is confirmed by the Admitted Facts filed in this case]. Thus he would have turned 18 only on 30 April 2020. Prior to that date he should be considered as a juvenile. Therefore, at the time of the alleged offending in respect of Counts 1 and 3, Aswak Ali was a juvenile. At the time of the alleged offending in respect of Counts 2 and 4, Aswak Ali was an accused.
- [6] As could be observed the accused/juvenile is charged with two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act; one count of Rape, contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act; and one count of Rape, contrary to Section 207 (1) and (2) (c) of the Crimes Act.
- [7] The first two counts against the accused/juvenile are charges 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)*

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

- (i) The juvenile;
- (ii) During the specified time period (in this instance between 1 January 2018 and the 31 December 2018);
- (iii) At Nadi, in the Western Division;
- (iv) Unlawfully and indecently assaulted RM, the first complainant, by rubbing the anus of RM with his penis.

[9] Similarly, in order to prove the second count of Sexual Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this instance between 1 October 2021 and the 28 October 2021);
- (iii) At Nadi, in the Western Division;
- (iv) Unlawfully and indecently assaulted RM, the first complainant, by rubbing the anus of RM with his penis.

[10] To further elaborate upon these elements in relation to the first two counts. 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/juvenile and no one else committed the offences.

[11] The second element relates to the specific dates 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.

[12] The accused/juvenile would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the first 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 rubbing of the anus of the first complainant with accused/juvenile's penis, is an indecent act and thereby amounts to Sexual Assault.

[13] The third count against the juvenile is a charge of Rape, contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act; while the fourth count against the accused is a charge of Rape, contrary to Section 207 (1) and (2) (c) of the Crimes Act.

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

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

[15] 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.

[16] Section 207 (2) (c) makes reference to a person penetrating the mouth of the other person to any extent with the person's penis without the other person's consent.

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

- (i) The juvenile;
- (ii) During the specified period (in this instance between 1 April 2020 and the 30 April 2020);
- (iii) At Nadi, in the Western Division;
- (iv) Penetrated the mouth of the second complainant RAD, with his penis; and
- (v) At the time the second complainant RAD was a child under the age of 13 years.

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

- (i) The accused;

- (ii) During the specified period (in this instance between 1 October 2021 and the 28 October 2021);
- (iii) At Nadi, in the Western Division;
- (iv) Penetrated the mouth of the second complainant RAD, with his penis;
- (v) Without the consent of the second complainant; and
- (vi) The accused knew or believed that the second complainant was not consenting, or the accused was reckless as to whether or not he 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/juvenile and no one else committed the said offences.

[20] The second element relates to the specific time period during 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 second complainant's mouth, with the accused/juvenile's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused/juvenile penetrated the mouth of the second complainant with his penis, to any extent.

[22] In respect of Count 3, the final element is that at the time of the incident the second complainant was a child under 13 years of age. The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As would be seen later in this judgment, the second complainant in this case was 11 years at the time of the alleged incident of Rape, and therefore, he had no mental capacity to give consent. [His date of birth being 17 July 2008].

[23] In respect of Count 4, 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 second complainant's mouth, with his penis, without his consent.

[24] 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.

[25] Apart from proving that the second complainant did not consent for the accused to penetrate his mouth, with his penis; the prosecution must also prove that, either the accused knew or believed that second complainant was not consenting or he was reckless as to whether or not he 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 second 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.

[26] Count 4 is also titled as a Representative Count. Section 70 (3) of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act") provides as follows:

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

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

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

[28] 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 Admitted Facts

[29] 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.

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

1. Aswak Ali (hereinafter referred as "accused") was 19 years old when investigated and questioned for the present matter. He was born on 30th April 2002 and was residing at Mulomulo, Nadi.
2. RM (hereinafter referred as "the first complainant") was 15 years old at the time the matter was reported to police. He resides at Mulomulo, Nadi.

3. RAD (hereinafter referred as “the second complainant”) was 13 years old at the time the matter was reported to police. He resides at Mulomulo, Nadi.
4. The accused was a DJ and Dancer by occupation at the time he was investigated for the present matter.
5. The accused and the first complainant, together with the second complainant are known to each other. They are all cousins and at the time of alleged incidences, they were all neighbours at Mulomulo, Nadi.

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

Case for the Prosecution

[32] The prosecution, in support of their case, called the first complainant (RM), the second complainant (RAD), and their mother Nazia Begum Moidean.

[33] The prosecution also tendered to Court a copy of the Birth Certificate of the first complainant as Prosecution Exhibit PE1 and a copy of the Birth Certificate of the second complainant as Prosecution Exhibit PE2.

[34] Evidence of the first complainant RM

- (i) *The first complainant’s evidence was recorded over a period of one day. His evidence was recorded in a ‘closed court’ and a screen was placed so that the first complainant could not see the accused/juvenile.*
- (ii) *The first complainant testified that he is currently 17 years old. His date of birth is 16 September 2006. A copy of his birth certificate was tendered to Court as Prosecution Exhibit PE 1.*
- (iii) *He is currently residing at Mulomulo, Nadi, with his family-his father, his mother, three sisters and one brother. The second complainant RAD is his younger brother.*
- (iv) *He is schooling at Nadi Muslim College and is in Year 12.*
- (v) *In the year 2018, he was living at Mulomulo, Nadi with his family. At the time he was 12 years of age (he would have turned 12 on 16 September 2018) and was studying at Mulomulo Muslim Primary.*
- (vi) *The first complainant testified to certain events which took place in the year 2018. He said: “When I was at home my parents went to the Nadi Market. After 12.00 noon I went outside to give food to the chickens. Then Aswak was calling from his room. I then went into his room and went inside. Then he showed me*

- a porn video. In that porn video two boys were sucking each other's dick. He told me to do the same thing with him. Then I told him I don't want to do this. Then he was forcing me to do it. Then he told me to bend down and took off my pants and my underwear and (he was) scrubbing his dick on my anus".
- (vii) The first complainant said at the time his parents had gone to the Nadi Market, it was only him, his brother and two sisters who were at home (his younger sister who is now 1 year of age was not born at the time). It was a sunny day.
 - (viii) The witness said that where his house is located, their chicken and duck's pen is beside Aswak's room (very close to his room). So when he took the food for the chicken Aswak was calling him from his room. The witness said that the distance between his house and Aswak's house was about 10 to 12 metres.
 - (ix) When he went to Aswak's room, Aswak was alone at the time. Aswak had shown the witness the porn video on his phone. At the time, Aswak had told him: "Don't worry, nothing will happen to you".
 - (x) The first complainant explained further that when Aswak told him to bend down, he didn't do it. But then Aswak had forcefully bent him down. The witness said: "He was holding my back part and then bent me down..... He was holding on my waist with his hands and pushing me down. After that he start taking out his dick (with his hand) and scrubbing on my anus."
 - (xi) The witness continued: "He (Aswak) he held my neck and he pushed me down to make me bend. He used one hand to do this. This happened one after the other (not at the same time)...my hands were on the bed at the time Aswak was pushing my head down".
 - (xii) The first complainant testified that when Aswak was doing this to him, he had just pushed him backwards with his hands and told him not to do that. However, Aswak had said don't worry nothing will happen to him.
 - (xiii) The witness explained that it was Aswak who had pulled down his pants and his underwear. The witness said: "First he made me bend down, then he pulled my pants and underwear. Then he scrubbed his dick on my anus".
 - (xiv) The first complainant said, by 'dick' he meant penis and by 'scrubbing' he meant that Aswak was rubbing his penis on the first complainant's anus. Aswak had been doing this act for about 3 to 4 minutes.
 - (xv) The witness said while Aswak was doing this to him, suddenly his sister had called and then he had run out of Aswak's room. At the time he ran out of the room, he was half naked. He had put on his underwear and his pants outside Aswak's room. Thereafter, the witness had proceeded to his house.
 - (xvi) After returning home, he had not immediately told anyone about the incident because he was scared. However, about 3 days later he had mentioned it to his mother. His mother had told him, if Aswak does it again, then to tell her and that they will report the matter to the Police. Then his mother had told his father to warn Aswak not to do this in the future as we are family.
 - (xvii) When asked as to what exactly he had told his mother, the witness said: "Three days later I told my mother that Aswak called me into his room and showed me

- a porn video where two boys were sucking each other's penis. Then he bent me down and scrub his penis on my anus".
- (xviii) The first complainant said that he did not give permission or consent for Aswak to do this to him.
- (xix) The first complainant next testified to the incidents which took place in the month of October 2021. He was in Year 10 at the time and attending Nadi Muslim College. At the time, he was living at Mulomulo, Nadi with his parents and siblings. He was 15 years of age at the time.
- (xx) When asked what happened, the witness said: "Again Aswak called me to his place. Around 3.00 to 4.00 p.m. in the afternoon. He called me to do the same act again..... (at the time) I was putting the clothes on the clothes line, then he called me. Then I went inside his house and he did the same thing again with me..... He asked me to suck his dick. I didn't do it. He said do it, nothing will happen. But without doing that act, I left the room".
- (xxi) The first complainant explained that at the time this incident happened, no one else was in Aswak's house. Aswak had called him from the window of his room. The witness had gone into Aswak's room-his bedroom. However, the witness said that nothing else happened in the bedroom that day.
- (xxii) The witness went on to testify that after a few days Aswak did the same act with his younger brother.
- (xxiii) The witness said that he did not tell the Police of the 2018 incident at the time it happened, as Aswak is his cousin and they didn't want any problems within the family. He said further that his mother had already warned Aswak not to repeat this and Aswak had agreed that he won't do it again.
- (xxiv) The first complainant identified Aswak as the accused/juvenile in the dock.
- (xxv) The first complainant was cross examined by the defence. The defence also put several suggestions to the complainant, totally denying the allegations made against the accused/juvenile.
- (xxvi) The first complainant agreed that his parents have a farm (a vegetable farm) and that Aswak used to work in that farm. He also agreed that in the year 2021, Aswak left working in the farm. He further agreed that it was the same year when this matter was reported to the Police.
- (xxvii) It was suggested to the witness that the allegations which he had raised against Aswak is not true. The witness denied this suggestion.
- (xxviii) The witness was referred to the statement made by him to the Nadi Police on 28 October 2021.
- (xxix) In cross-examination the witness clarified that while the 2018 incident was happening it was his mother who had called him (in evidence in chief he had said, it is his sister). The witness further clarified that he had informed his mother about what Aswak did to him in 2018 on the very same day (in evidence in chief he had said it was 3 days later). This is how it is reflected in his statement made to the Police.

- (xxx) *It was suggested to the witness that when Aswak left working on the farm, that his parents were very upset. The witness denied this suggestion and said: "We already found an iTaukei girl from the same village who started working on the farm. That girl has earlier worked in the farm with Aswak. Aswak knows about that too."*
- (xxxi) *It was suggested to the witness that in the year 2018 Aswak did not allegedly rub his penis on his anus. The witness said that he did so.*
- (xxxii) *It was suggested to the witness that his parents had instigated him to lodge this false complaint against the accused/juvenile. The witness categorically denied this suggestion and said that the accused/juvenile is telling a lie. He said, his parents never told him to do that.*
- (xxxiii) *It was further suggested to the witness that his parents had instigated him because Aswak had left working in the farm. The witness denied this suggestion.*

[35] Evidence of the second complainant RAD

- (i) *The second complainant's evidence was recorded over a period of one day. His evidence was recorded in a 'closed court' and a screen was placed so that the first complainant could not see the accused/juvenile.*
- (ii) *The second complainant testified that he is currently 15 years old. His date of birth is 17 July 2008. A copy of his birth certificate was tendered to Court as Prosecution Exhibit PE 2.*
- (iii) *He is currently residing at Mulomulo, Nadi, with his family-his father, his mother, three sisters and one brother. The first complainant RM is his older brother.*
- (iv) *He is schooling at Nadi Muslim College and is in Year 10 (Form 4).*
- (v) *In April 2020, he was living at Mulomulo, Nadi with his family. At the time he was 11 years of age (he would have turned 12 on 17 July 2020) and was studying at Mulomulo Muslim Primary, in Year 7.*
- (vi) *The second complainant testified to events which took place in the year April 2020. He said: "It was the month of Ramadan. My cousin brother Aswak asked me to help him shift his things-his bed and closet (cupboard) to shift it from his house to the room. I helped him.....His room is out of the house-it is separated from the main house. There is a partition separating the room from the main house.....It was evening. I don't remember what time it was.... When we finished shifting, he told me to sit on his bed and wait (the bed in his room). He went and closed the main door of his room....He took off his pants. When I asked him, he said we will get ready and go together for prayers....Apart from his pants, he was wearing a shirt. He didn't take off his shirt. At the time he took off his pants, I was on the bed. He then came and sat beside me and when I wanted to go, he held my hand (my right hand) and stopped me and made me sit on the bed again....When I told him that I wanted to go, he then told me wait, I will show you a video. I was waiting. Then he showed me a video on his*

- phone. Two boys were sucking each other's private part-sucking each other's penis. He then held my head and forced me to suck his penis. I did suck his penis.... After that he just held my head and wanted me to suck his penis. I didn't want to do it so he did it by force-I sucked his penis".
- (vii) The witness explained that Aswak had put his penis into his mouth (second complainant's mouth). He had put his penis into the second complainant's mouth, 2 to 3 times. The witness said, he had tried to push Aswak back but he couldn't since Aswak was holding his head.
 - (viii) After Aswak had put his penis into the second complainant's mouth 2 to 3 times, Aswak had then removed his hand. Then the second complainant had escaped and gone home.
 - (ix) After returning home the second complainant said he had got ready and gone for prayers at his uncle's place (his father's cousin brother). He is also their neighbour and his house is located 100 metres away from his house.
 - (x) The witness said that he had not told anyone at the time about what Aswak did to him. He said he did not do so because he was afraid and he was also not able to understand the main reason Aswak did such a thing to him.
 - (xi) The witness further testified to an incident which took place in October 2021. At the time the witness was living at Mulomulo, Nadi, with his parents, his sisters and brother. He was in year 8 and was attending Mulomulo Muslim Primary.
 - (xii) The witness said: "I went to my (cousin) brother Aswak's room to wake him up. I called him by his name from the window. I was at the window-I was standing beside the window of his room. I think the time was about 3.00 p.m. He was our labourer-he was working in our farm/vegetable farm. He then woke up and opened the door and called me in by saying that he needs a help. I went into the room. Aswak was wearing a sulu at the time. Apart from that, he was not wearing anything else.....He made me sit on the bed and he was also sitting on the bed. I was wearing a shirt and pants. He asked me to suck his penis. When I refused, he held my right hand and with his other hand he held my head and he pushed me towards his penis and he put his penis into my mouth".
 - (xiii) The witness explained that Aswak put his penis into his mouth for about 30 seconds.
 - (xiv) The witness said he did not do anything because he did not know the main reason why Aswak forced him to suck his penis. He said he was underage and immature at the time. When asked how Aswak had forced him to suck his penis the second complainant said: "By pushing my head to suck his penis".
 - (xv) The witness said he did not consent or give his permission to Aswak to put his penis into his mouth. Further, he testified that Aswak knew that he was not giving his consent for him to insert his penis into the second complainant's mouth.
 - (xvi) The witness stated that he felt like vomiting and moved out of the room. Thereafter, he went to the farm straightaway. The farm is located a bit far

away from his house. It would take 2 to 3 minutes to walk from his house to the farm.

- (xvii) The witness said that after a few minutes Aswak came to the farm and told him to come again in the afternoon to do the same thing again. The witness said that he refused. He continued: "He then showed me the video and said if you don't come in the afternoon I will show it to everyone".
- (xviii) Thereafter, the witness had returned to his house, while Aswak had gone back to his house. The witness said that upon returning home his siblings had been at home. He had not told his siblings anything about what Aswak had done to him. He said he did not do so because he felt shy and was nervous to tell his siblings about the incidents.
- (xix) Thereafter, the matter had been reported to the Police. The witness said that he had informed his parents about the incident when the person who saw the video had told his parents about it. The uncle who saw the video was a labourer of his father's cousin brother and also their neighbour. His name is Tomasi.
- (xx) The second complainant identified Aswak as the accused/juvenile in the dock.
- (xxi) The witness said that he did not tell his parents earlier about what Aswak did because he was thinking about what his parents will think about him and also because Aswak was their relative.
- (xxii) The second complainant was cross examined by the defence. The defence also put several suggestions to the complainant, totally denying the allegations made against the accused/juvenile.
- (xxiii) It was suggested to the witness that the reason he did not inform anyone about the alleged incident which took place in April 2020 or the alleged incident which took place in October 2021, because the alleged incidents did not take place. The witness denied this suggestion.
- (xxiv) The witness agreed that he shared a close relationship with Aswak as cousins. He also agreed that the Aswak's house and his house were located close to each other (they were neighbours). He also agreed that his parents had a vegetable farm and that the accused/juvenile used to work in the farm. He agreed that the accused/juvenile had left working in the farm in the year 2021.
- (xxv) When asked whether his parents were upset because the accused/juvenile had left working in the farm, the witness said: "They were not upset because there was another Fijian girl working (on the farm) and even before when he was working with my father, my father used to work alone and handle the farm".
- (xxvi) It was suggested to the witness that his parents was upset when Aswak left working in the farm. The witness denied this suggestion.
- (xxvii) It was further suggested to the witness that his parents had instigated him to lodge a false report against the accused/juvenile. The witness categorically denied this suggestion.

[36] Evidence of Nazia Begum Moidean

- (i) *The witness testified that she is 40 years of age and residing at Mulomulo in Nadi. They have been residing there for the past 22 years. Her husband's name is Ashrad Dean. She has 5 children. The first complainant is her 3rd child and the second complainant is her 4th child*
- (ii) *The witness testified to an incident which took place in the year 2018. She said: "I was calling my son RM. He was in Aswak's room. When he came then I asked him what were you doing there. I asked him twice. Then he told me, Aswak pulled my pants down and Aswak was also pulling his pants down. Then I told him you are not supposed to do this thing. It is a bad thing. Something else can happen. I explain to him. Then I informed my husband about this and I told my husband to go and speak to Aswak (and to tell him) not to do this as we are family. My husband did go and speak to Aswak and told him not to do all this".*
- (iii) *The witness said that Aswak is her husband's sister's son – her nephew. She has known Aswak since childhood.*
- (iv) *The witness identified Aswak as the accused/juvenile in the dock.*
- (v) *In cross examination the witness agreed that when her son RM informed her about the alleged incident in 2018, she and her husband did not report the matter to the Police immediately. It was suggested to her that she and her husband did not report the matter to the Police because she did not receive any such information from her son RM. The witness explained that they did not report the matter at the time because they are family and also because her husband had spoken to the accused/juvenile and told him not to do such things in the future.*
- (vi) *It was suggested to the witness that she and her husband were upset because Aswak left working in their farm and due to this reason they were not on good terms with him. The witness denied these suggestions.*
- (vii) *It was further suggested to the witness that because they were not on good terms with the accused/juvenile they had instigated their 2 sons to lodge a false complaint against him. The witness denied this suggestion.*

[37] 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 Sexual Assault 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.

[38] However, this Court decided to call for the defence in respect of the remaining three counts-Counts 1, 3 and 4. The accused/juvenile 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/juvenile that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[39] The accused/juvenile exercised his right to remain silent.

Analysis

[40] As stated before, the prosecution, in support of their case, called the first complainant (RM), the second complainant (RAD), and their mother Nazia Begum Moidean. The accused/juvenile exercised his right to remain silent.

[41] 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 respect of the four counts at paragraphs 8, 9, 17, and 18, of this judgment, respectively.

[42] 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.

[43] Based on the said admitted facts it is admitted that the two complainants and the accused/juvenile are known to each other since they are cousins and at the time of the alleged incidents, they were all neighbours at Mulomulo in Nadi. Therefore, the identity of the accused/juvenile is not in dispute.

[44] The first complainant's date of birth is 16 September 2006. Thus, at the time of the alleged offending he was between 11-12 years of age (in respect of Count 1) and 15 years of age (in respect of Count 2). At the time he testified in Court he had turned 17.

[45] The second complainant's date of birth is 17 July 2008. Thus, at the time of the alleged offending he was 11 years of age (in respect of Count 3) and 13 years of age (in respect of Count 4). At the time he testified in Court he had turned 15.

- [46] I have summarized the evidence of all witnesses led during the trial.
- [47] During his testimony the first 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, 3 and 4.
- [48] The two complainants clearly testified to the manner in which the accused/juvenile had perpetrated the alleged acts on them.
- [49] The accused/juvenile totally denies all the allegations made against him by the two complainants. The defence position is that the two complainants' parents were upset because the accused/juvenile left working in their farm and due to this reason they were not on good terms with him. The defence position is that due to this fact the two complainants' parents had instigated the two complainants to lodge a false report against the accused/juvenile.
- [50] It must be emphasized that soon after the alleged incident took place in the year 2018 (on the same day), the first complainant had informed his mother about the incident.
- [51] The mother of the two complainants, Nazia Begum Moidean, was called by the prosecution as the recent complaint witness. She testified as to how the first complainant had informed her of what the accused/juvenile did to him in the year 2018. She said that she was calling her son RM. He was in Aswak's room. When he came she had asked him what he was doing there. She had asked him twice. Then her son had told her that Aswak pulled his pants down and Aswak was also pulling his pants down.
- [52] 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 first complainant made a proper complaint in this case. Accordingly, I consider that his credibility is strengthened in view of that recent complaint.

- [53] 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 first complainant with his evidence given at the trial. It goes to support and enhance the credibility of the first complainant.
- [54] The Defence attempted to impeach the credibility of the two complainants during their cross examination by stating that the two complainants did not report the matter to the Police immediately as it happened.
- [55] I agree that the matter was formally reported to the Police only on 28 October 2021. This was nearly three years after the alleged incident of Sexual Assault that the first complainant had complained about and over one year after the alleged incident of Rape that the second complainant had complained about.
- [56] However, this Court is conscious of the fact that children do not always react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned.
- [57] The two complainants have clearly testified as to the reasons for the delay in reporting the matter to the Police. The first complainant had even informed his mother the very same day about what the accused/juvenile had done to him in the year 2018. However, since the accused/juvenile was their relative, the father of the two complainants had spoken to the accused/juvenile and told him or warned him not to do such things in the future. In these circumstances, I am satisfied with the two complainants' explanation for the delay in reporting the matter to the Police.
- [58] 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. In any event, in my opinion, it is highly unlikely for any parent to instigate their minor children to fabricate a complaint of such a nature against the accused/juvenile, merely due to the fact that the said accused/juvenile had stopped working in their farm.
- [59] Having analysed all the evidence in its totality, it is my considered opinion that the evidence of the two complainants, can be accepted as truthful, credible and reliable.

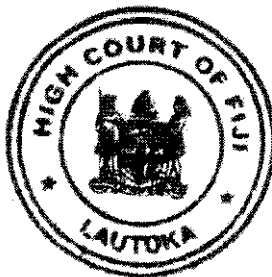
The two complainants withstood the cross examination by the Defence and remained consistent throughout their evidence, in relation to the material particulars of this case.

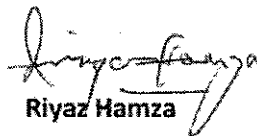
[60] It must also be mentioned once again that in terms of the provisions of Section 129 of the Criminal Procedure Act, where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted.

[61] 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 (Count 1) and Rape (Counts 3 and 4) with which the accused/juvenile has been charged.

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

[63] Accordingly, I convict the accused of the fourth count of Rape with which he is charged.




Riyaz Hamza

JUDGE
HIGH COURT OF FIJI

AT LAUTOKA

Dated this 7th Day of November 2023

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

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

