

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

**CRIMINAL CASE NO: HAC 156 OF 2023**

**STATE**

**V**

**ILAISA DAU**

**Counsel:** Ms. Vakaloloma for the State  
Ms. Taukei of LAC for the Accused

**Date of Trial:** 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> November, 2024

**Closing Submissions:** 08<sup>th</sup> November, 2024

**Date of Judgment:** 19<sup>th</sup> November, 2024

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

**JUDGMENT**

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

**Count 1**

**State of Offence**

**INDECENT ASSAULT:** Contrary to Section 212 (1) of the Crimes Act 2009.

**Particulars of Offence**

ILAISA DAU, on the 03<sup>th</sup> of September 2023, at Lautoka, in the Western Division, unlawfully and indecently assaulted ADI MAKARITA by kissing the cheek of the said ADI MAKARITA.

## **Count 2**

### **Statement of Offence**

**INDECENT ASSAULT:** Contrary to Section 212 (1) of the Crimes Act 2009.

### **Particulars of Offence**

ILAISA DAU, on the 30th of September 2023, at Lautoka, in the Western Division, unlawfully and indecently assaulted ADI MAKARITA by touching the breast of the said ADI MAKARITA.

## **Count 3**

### **Statement of Offence**

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

### **Particulars of Offence**

ILAISA DAU, on the 30th of September 2023, at Lautoka, in the Western Division, penetrated the vagina of ADI MAKARITA a child below the age of 13 years, with his penis.

## **Count 4**

### **Statement of Offence**

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

### **Particulars of Offence**

ILAISA DAU, on the 30th of September 2023, at Lautoka, in the Western Division, penetrated the mouth of ADI MAKARITA a child below the age of 13 years, with his penis.

- [2]. The accused pleaded not guilty to the charge and the trial commenced on the 5th of November 2024 and concluded on the 8th of November 2024 with the prosecution calling five witnesses and the defence calling three witnesses in support of their case. Both parties made oral closing submissions and the matter was adjourned to the 14th of November 2024 for judgment.

## **Burden and the Standard of Proof**

- [3]. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

## **Elements of the Offences**

- [4]. The accused is charged with two counts of Indecent Assault and two counts of Rape, contrary to Section 212 of the Crimes Act and 207 (1) and (2) (a) and (3) and section 207(1) and (2) (c) and (3) of the Crimes Act, 2009.

## **Counts 1 and 2 Indecent Assault**

- [5]. For the accused to be found guilty of "indecent assault", the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused
  - (ii) unlawfully and indecently
  - (iii) assaults the complainant.
- [6]. Under the Crimes Act 2009, an offence must have a physical element and fault element (Section 13 (1), 15(1) and 18(1) of the Crimes Act 2009). For "indecent assault", the physical element of the offence is the accused's conduct of "assaulting the complainant". The fault element of "indecent assault" is the accused's "intention of assaulting the complainant unlawfully and indecently". Both the physical and mental elements of the offence must be satisfied by the prosecution, beyond reasonable doubt, before an accused can be found guilty of "indecent assault" (Section 14 of the Crimes Act 2009).
- [7]. It was often said that "the least touching of another in anger is an assault". It is the unlawful application of force to the person of another. Although the touch may not be painful, nevertheless the touching is in law an application of mild force on the person of another. It is still unlawful, unless the person receiving the touch had given her or his consent, or alternatively, there are other justification in law for the conduct. The touch or conduct becomes indecent if right thinking members of society considers the same to be indecent, given the surrounding circumstances. It was the court that will have to decide the issue of "indecenty", taking into account as a guide the views of "right thinking members of society" (State v Isoa Rainima, Criminal Case No. HAC 064 of 2017S, High Court; Suva, Archbold, Pleading, Evidence & Practice in Criminal Cases, 42 ed., 1985; Peter Gillies, Criminal Law, 4th ed, 1997, pages 604 to 612).

**Counts 3 & 4: Rape.**

[8]. Section 207 of the Crimes Act reads as follows:

Any person who rapes another person commits an indictable offence.

[9]. Section 207 of the Crimes Act is reproduced below:

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.

[10]. Section 207 (2) (a) A person rapes another person if- the person has carnal knowledge with or of the other person without the other person's consent; or

Therefore, in order to prove the count 3 of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) penetrated the vagina of "AM"
- (iii) with his Penis
- (iv) The complainant' "AM" was below the age of 13 years.

[11]. For Count 4 rape the prosecution must establish beyond reasonable doubt that the accused;

- (i) During the specified period (in this instance on the 30<sup>th</sup> of September 2023
- (ii) At Lautoka, in the Western Division;
- (iii) Penetrated the mouth of the complainant "AM", with his penis;
- (iv) The complainant "AM" was a child under the age of 13 years

- [12]. The final element is that at the time of the incidents the complainant was a child under 13 years of age. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As would be seen later in this judgment, the complainant in this case was 10 years at the time of the alleged incident of Rape, and therefore, she had no mental capacity to give consent. Her date of birth being 22<sup>nd</sup> of February, 2014.

### **Admitted Facts**

- [13]. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these facts as accurate truthful and proven beyond reasonable doubt.
- [14]. The admitted facts are reproduced herewith as,
- i) The complainant in this matter is “AM” Adi Makarita
  - ii) The accused Ilaisa Dau is charge with two counts of indecent assault and two counts of Rape
  - iii) The accused Ilaisa Dau is also known as “Bogi”.
  - iv) That Ilaisa Dau was 80 years in 2023.
  - v) That Ilaisa Dau resides at California road.
  - vi) That the alleged incident happened on the 30<sup>th</sup> of September 20 23
  - vii) The Complainant told the accused that she was a year 9 student at Nadi Sangam College.
- [15]. 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.

### **Prosecution Evidence**

- [16]. The prosecution, in support of their case, called the complainant (AM), MANAINI (PW2), Adi Makarita (PW3) , Doctor Salome Daunivalu (PW4) and Nanise Tinai (PW5) .
- [17]. The prosecution also tendered to Court the copy of the complainant’s Police medical Report Form as Prosecution Exhibit PE1 and the National Medical Card of the complainant as Prosecution Exhibit PE2.

### **Evidence of the Complainant “AM” [PW1]**

- [18]. She is the complainant. She testified and stated that on the 30<sup>th</sup> of September 2023 she was calling “mere’s” name at the house where the accused lives. At the same time the accused came out of the bathroom and pulled her hand inside the house.

- [19]. The complainant said that the accused kissed her cheek and inserted his balls inside her "pipi". She said her "pipi" is the part of her body which she urinates from. She could see the accused face very clearly.
- [20]. She said the accused balls is the part of his body where the accused Urinates from. She said the accused kisses her right cheek. The accused than inserted his penis into her mouth for some time. After the accused left the complainant at the front door and she met Manaini. The accused told her not to tell anyone what the accused had done to her.
- [21]. She said she can feel body pain after the accused had put his penis inside her "pipi". No one else was inside the house when the accused had done this to her. The accused told her not to tell anyone. She said she met Manaini near the toilet outside, and she told Manaini what the accused had done to her.
- [22]. According to the witness when the accused put his balls inside where she used to urinate from and then into her mouth she can feel her body pain. She said that the accused was alone in the house at that time and it was during the day time. She met Manaini beside the accused's toilet outside of their house.
- [23]. The accused forcefully opened the mouth of the accused and then inserted his balls into her mouthing whilst the complainant was still lying down .At that time the accused was lying on her side.
- [24]. She informed Manaini that the accused had touched her breast and inserted his balls into the place where she used to urinate from. Manaini told her to inform her grandmother. Her grandmother send her there to buy Tuna for her grandfather. She said she also informed her namesake on Sunday afternoon. She did not informed her grandmother because she thought that she will be punished.
- [25]. She said her grandmother, her namesake and herself went to report the matter at the Police Station. From the police Station she went to the hospital for medical examination. She said she is not related to the accused.
- [26]. According to her they normally called the accused "Bogi". She identified the accused sitting in the accused box to be the same Bogi who had rape her that day.
- [27]. In cross examination she confirmed that she was not schooling and during the day she used to be at home all the time, helping out her grandmother and also playing. She said she used to play hide and seek with her friends. She also plays inky pinky ponky.

- [28]. She said it was around midday when her grandmother to go to bog i's home to buy tuna. She said she thought it was about 2.00pm and Bogi was at home. She said she went to the police Station and the police wrote her statement. She cannot read and on that day the police wrote down what she was telling them at the police station.
- [29]. In cross examination she agreed that she earlier stated that she was wearing trousers. Her statement was put to her on Q& A 17, 18. She confirms the thumb print signature on the statement is her thumb print. In her statement she said that she was wearing a t-shirt, skirt and a panty.
- [30]. She maintained what she said in court today is the truth. She did not answer when it was again put to her that she told offices on that day that she was wearing a skirt, a T-shirt and not a trousers.
- [31]. She said she would not know what the balls would look like. She said she did not see the accused balls on that day. She refute the proposition that accused did not put his balls inside her "PIPI" and confirm that the accused did so. She confirmed that the accused inserted his balls into her Pipi and secondly into her mouth. She also saw the accused balls.
- [32]. Further in cross examination she said that she did not see any tube attached to his balls.

**PW2: Manaini Naluvui**

- [33]. She resides in Lovu California. She is a year 10 student at Jasper Williams high School. She recalls on the 30<sup>th</sup> of September 2023. On that day which was a Saturday. She went to buy biscuit and sugar to Aunt mere's house where the accused resides. She said the old man was Ilaisa Dau.
- [34]. According to her she saw the complainant "AM" seating near the door. She said when she turned to her left "AM" followed her and called her sitting that the old man was touching her breast.
- [35]. The old man told the witness that Mere has gone to Sigatoka. She said only the old man "Bogi" and Makarita were at the house that day. The old man was inside the house. She said the old man was on top of the mattress in the sitting room. She said the old man's real name was Ilaisa Dau. She said the time was around 12.00pm midday.
- [36]. The witness said after she was being informed that Mere has gone to Sigatoka she left back to her home and was followed by Adi Makarita. She said the complainant called her from behind and told her the accused was touching her breast. The complainant looked afraid whilst conversing with the complainant.

- [37]. The witness said she is related to the complainant. The complainants' mother is her cousin. She is well aware of the accused as Mere's husband is her uncle. She pointed at the Ilaisa to be Old man to be the same person he saw on the house net morning.
- [38]. In Cross Examination she stated that she was unable to buy biscuit and sugar on that day because Mere was out to Sigatoka. She said the complainant was seating at the doorway watching TV. She said both his evidence in court and her police Statement are both true.
- [39]. She said the accused was inside the house on that day. The complainant told her that the accused kissed her cheek. She said later she informed her brother. The old man was not in town but was at home on that day.
- [40]. In re-examination she confirmed that Makarita was seating near the door step whilst the old man was seating on the mattress in the living room. She confirmed that she saw him inside the house on that day. She also stated that Makarita told her that the old man touched her breast.

**PW3: Makarita Adi**

- [41]. She confirmed that the complainant is her namesake the daughter of her sister. She said the complainant relayed her story to her stating that she went to buy tin tuna at meres house and when she called Mere's name the accused responded telling her to wait. The accused came from the bathroom pulled her hands inside the house and laid her down on the mattress kissed her cheek, took off her trousers and inserted his penis into her vagina and also inserted his penis into her mouth.
- [42]. She said she did not know who this Bogi was as he recently came to live there. She stated that this was the very first day she came to know him. Her name sake the complainant told her the next day. It was on a Sunday. The complainant told her at her mom's place. Her mom is Nanise Tinai and also the complainant's grandmother.
- [43]. She stated that when the complainant was telling her the story of what happened she looked scared. She believed her and they proceeded to the police Station to report the matter. The complainant is 10 years old. The complainant's mothers name is Akesa Florian. She is her younger sister.
- [44]. In cross examination she said she met the accused for the first time when the police arrived at the scene. She stated that the accused was staying at her neighbor's house. She said she asked about "Bogi" and her mom stated that the accused is the namesake of the owner of the shop.
- [45]. She said she did not visit the accused to ask him about what happened. She said that they have informed the accused namesake and his wife of what the accused had done to the complainant and they have advise them to report the matter to the police.



**PW 4: Salome Daunivalu**

- [46]. She was the doctor who had examined the complainant on the 3<sup>rd</sup> of October 2023. She was a medical officer for the past 10 years and had worked at various divisional hospitals throughout the country. She stated that she had dealt with cases of this nature with an average of 7 to 15 cases in a month.
- [47]. The Police Medical examination report Form was shown to the witness and she identifies her signature confirming that she was the doctor who had examined the complainant in this case. She confirmed that her signature is on page 4 and her initials on pages 1, 2, 3, and 4.
- [48]. She said on 3.10.23 she examine one Adi Makarita at 1300hrs. Since the complainant was under 18 years they require a family member to accompany the child. The history was relayed to her by the child.
- [49]. In her findings outlined under column 12 of the medical report she stated there was no pivotal hair growth, the hymn walls appeared red and swollen. The urethral which is the opening of the urine passage appears red and swollen and there was abrasion of the posterior facet. The anal was intact and the hymen given it appeared with inflammation it appears to be not intact.
- [50]. When the hymen is red and swollen it is not normal. She stated that the inflammation indicates an injury to the hymen caused by related penetration or was marked as MFI 1.
- [51]. Doctor Daunivalu tendered the medical report of the complainant as PEX 1. She also confirms the medical card of the complainant contains her date of birth which was 22. 02.2014.
- [52]. Doctor Daunivalu confirmed that there was no injury on the neck. She said she did not see any injuries in the mouth. She said the complainant did not mention anything about her having eye problem. In terms of any laceration would depend on the force applied at that time. She said that the complainant did not tell her that she saw the accused penis. In re-examination she affirmed that for child penetrative any force can cause, it can be extreme force or minimal force

**PW5: Nanise Tinaisausau**

- [53]. She is the maternal grandmother of the complainant and the complainant resides with her at her residence in California, Lovu. She confirmed that the complainant was brought to her when she was 8 months old after birth. The Social Welfare department brought the complainant to her. She cannot recall the exact date her granddaughter was brought to her.
- [54]. However, she can recall when the complainant was brought to her, they also brought her clinic card along with her. The Medical Clinic Card

contains her exact date of birth which is on the 22. 02. 2014. MFI 1 was shown to the witness and she confirmed that it was the same clinic card handed over to her. She tendered MFI 1 medical Clinic card of Adi Makarita as PEX 2.

- [55]. Prosecution closes its case. Defence Counsel made an application for No Case To Answer on Count 2 Indecent Assault. The State concedes to the same, I find there is a case to answer on Counts 1, 3 and 5 of the information and a no case to answer on the second count *indecent Assault against the accused*. The accused was acquitted on the second count of the information
- [56]. The accused is explained with his three options available to him during defence case. The accused opted to give evidence and call two more witnesses in support of his case.

### **Defence Evidence**

#### **DW1: Ilaisa Dau**

- [57]. He said he is suffering from urination problem. It started in 2022 Korovou Tailevu. He was transferred to Lautoka and he was residing at his namesake residence at California Lovu. He said he had two scans and two x rays and a tube was inserted inside his penis assist in his urination. The length of the tube from the tip of his penis outside is about the length from his wrist to his fingertip.
- [58]. He said the tube is not inserted permanently and it can be changed there are dates where the tube was changed normally it's in three weeks. Sometimes they change it after one month. He said the replacement is done instantly. Without the tube it is painful when urinating. He said the tube was inserted in his penis on 22<sup>nd</sup> February 2022.
- [59]. He said the nurse inside the correction facility is responsible for changing the tube. He recalls on the 3.09.23 he was at his namesake's house. He had his breakfast at about 11.00am he proceeded to town to meet his niece Ilisebeta at the market. She was with her niece till 5pm before he left back home.
- [60]. He denied on that date he was at the house in California Lovu at the time of He denied penetrating the vagina of the victim with his penis and also into her mouth. He denied that Manaini the recent complaint witness saw him on that date.
- [61]. In Cross Examination He agreed that his namesake's wife is Mere and he was living with them since 2022. He agrees that mere operates a canteen store from their house. He recalls 30.9. 23 was a Saturday. He agreed that both his namesake and mere were not at home. He denied he was a

home at that date. It was put to him that Manaini saw him and also spoke to him on that date. He denied the same. He said they were telling lies.

- [62]. He said he was earlier on mistaken mere did not go to Sigatoka they went to Raviravi. It was put to her that she was not with Elisabeta on 30<sup>th</sup> of September 2023 and he was at on that date. He denied he was at home. It was put to him that he was only saying that he was with Ilisabeta to cover up for him. He disagreed with the same.
- [63]. It was put to him that Adi Makarita has no reason to lie about what the accused had done to her that he had raped her on that date. He disagree with same.

**DW2: Ilisabeta Lewairoro**

- [64]. He said he has forgotten the date the police officers called her. He said she was asked by police whether she was with the accused on that particular date she said "yes" but she said she was not aware of what had happened. She said on she was escorted to the 2nd floor where she was asked by police who was with her at the market on that particular date. She said she has forgotten the date. He said on that date she saw her uncle the accused coming at about 8 -9 am. AT about 4 to 5 pm the accused informed her that he is going back to his home at California.
- [65]. In cross examination she said she has forgotten the date her uncle came to visit her. She cannot recall whether it was last year or this year. She said she would do anything for her uncle.

**DW3: Dr Raven Singh**

- [66]. He said he has been a medical officer for the last 5 years after graduating from University of Fiji with an MBBS degree. He did 1 year internship at University of Fiji. He has been the medical officer for the past 5 years. He is a general practitioner and is based at correction Center Natabua. He knew the accused Ilaisa Dau.
- [67]. His first encounter with Mr. Dau was when the accused was remanded last year and he was convicted again in May this year. He was one of their main cases has a medical condition known as Urinary Retention for which he is on IDC known as fault catheter.
- [66]. Its like small plastic tube with an opening this part of the IDC is inserted at the tip pf the penis and it is to provide for urine out of the patient. From the medical records the accused had an enlarge prostate. He had a blood test in 2022.It was at Lautoka Aspen Hospital. He said the IDC needs to be change every one to two months.
- [68]. In cross examination. He said he does not know whether there was continuous use he noticed the IDC when he was in remand not prior to that. He was diagnosed in 2022and that was when IDC was placed. He

said he was uncertain which month. He said has IDC was change by the nurse. He said at no time he had change the catheter

- [69]. He said the catheter is us by patients who are bedridden and are not able to go the restroom. During remand he did not carry out any test ever since he was in remand he did not carry out any further testing. Between 2022 and 2024 he did not conduct any further scan or testing

#### **DIRECTION ON RECENT COMPLAINT**

- [70]. Complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
- [71]. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that the complainant told the Manaini (PW2) and her namesake Adi Makarita (PW3) that the accused was kissed her cheek, inserted her penis into her vagina and mouth.
- [72]. This is commonly known as recent complaint evidence. The evidence given by Manaini (PW2) and Adi Makarita (PW3) her namesake are not evidence of what actually happened between the complainant and the accused since the two were not present and did not see what had happened between the complainant and the accused.
- [72]. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told Manaini and her namesake about what the accused had done to her soon after the incident.
- [73]. The prosecution is also asking this court to consider the observations of the complainant by Adi Makarita, her namesake (PW3) at the time she was relaying the conduct of the accused when she was informed by the complainant that the accused pulled inside the house by the accused and had done these acts to her therefore she is more likely to be truthful. Adi Makarita (PW3) said that when the complainant was telling her what the accused had done to her the complainant looked scared and she believed her.
- [74]. On the other hand, the defence says the complainant had made up a story against the accused, the defence version was that the accused was not at

home at the point in time and the complainant and the PW2 Manaini are both telling lies.

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

#### **PREVIOUS INCONSISTENT STATEMENT**

- [76]. This court directs its mind to the fact that the defence counsel during cross examination of the complainant had questioned the same about some inconsistencies in her police statements which she had given to the police when facts were fresh in her mind with their evidence in court.
- [77]. This court is allowed to take into consideration the inconsistencies or omissions between what this witness told the court and her police statement when considering whether the witness was believable and credible. However, the police statement are not evidence of the truth of its contents.
- [78]. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
- [79]. If there is any inconsistency or omission, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witness. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
- [80]. In this case the complainant was questioned in examination in chief on what was she wearing on that date? She said she was wearing trousers and the accused had remove her trousers. In cross Examination her police statement on Q& Answer 17 and 18 she said she was wearing T-shirt skirt and panty. On Q19 and Answer she stated the accused removed her shorts down to her knees. Later she did not answer when the question on which of these two statement was true. In **Nalawa v State [2021] FJCA 188; AAU014.2016 (25 June 2021)** on paragraph 17 the Court of Appeal held that

17] *It is neither wise nor fair to judge the evidence of a child victim using the same yardsticks employed for adults. In R. v. W. (R.) [1992] 2 SCR 122 the*

Supreme Court of Canada examined this aspect of the evidence of children and held as follows:

*The law determining the evidence of children has undergone two major changes in recent years. First, there is a new appreciation that it may be wrong to apply adult tests for credibility purposes to the evidence of children. While the evidence of children is still subject to the same standard of proof as the evidence of adult witnesses in criminal cases, it should be approached not from the perspective of rigid stereotypes, but on a common sense, taking into account that the strengths and weaknesses which characterize the evidence offered in the particular case. Court of Appeal went too far in this case in finding lacunae in the evidence which did not exist and in applying a stringential approach to the evidence. It appears to have been influenced by the old stereo types relating to the inherent unreliability of children's evidence and the "normal" behavior of victims of sexual abuse and to have placed insufficient weight on the judge's findings of credibility. The verdicts in this were ones which a properly instructed jury (or judge), acting judicially, could reasonably have rendered. (Emphasis added)'*

- [81]. The Court of Appeal in **Mohammed Nadim and another vs. State [2015] FJCA 130; AAU0080.2011 (2 October 2015)** had made the following pertinent observations about the above at paragraph 15 and 16 as follows:

*It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.*

- [82]. The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):**

*"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. .... It is unrealistic to expect a witness to be a human tape recorder;*

## **ANALYSIS**

- [83]. The prosecution alleges that the accused on 30<sup>th</sup> September 2023, had pulled the complainant into the house, kissed her cheek and removed her skirt, shorts and panty and forcefully inserted his penis into her vagina and had forceful sexual intercourse with her. The accused also and also inserted his penis into the complainant's mouth.
- [84]. The complainant aged 10 years at the time of the offending had informed her friend Manaini (PW2) who also came to the same house on that morning to buy items from the canteen.
- [85]. The prosecution submits that the complainant also informed her namesake (PW3) on the next day that the accused had kissed her cheek, inserted his penis into her vagina and inserted his penis into her mouth at her grandmother's place.
- [86]. The accused was medically examined on 3<sup>rd</sup> of October 2023 and the doctor confirmed that the injuries she found on the complainant's vagina was consistent to penile penetrative course and complainant's hymen was not intact. The injuries found were consistent history relayed by the complainant that she was raped by the accused.
- [87]. Hence, the prosecution noted that despite the minor inconsistencies in the complainants evidence and what was written in her police statement The complainant evidence was unshakeable when she maintained at all times that the accused had touched her breast, penetrated her vagina and her mouth with his penis.
- [88]. On the other end, the defence are saying that the complainant and the Manaini (PW2) are not telling the truth. The defence has called two other witness to testify supporting his position. The defence is asking this court not to believe the complainant and Manaini (PW2).
- [89]. The defence has called alibi witnesses and a doctor to support the accused in his version of evidence. I have heard the evidence of the alibi witness. I find parts of her evidence to be not reliable as she cannot confirm the date the accused came to visit her. When she was asked about the date. She said she has forgotten the date. Even she cannot tell whether the incident happened this year last year.
- [90]. The defence also called a doctor to confirm that the accused was suffering from difficulty and a tube was inserted in 2022 to assist in urinating. However, PW5 Doctor Salome had confirmed that if a tube was inserted into the accused penis at that time, the tube is made up of laxity rubber as much as possible that it is comfortable to the patient. The tube is a rubber and it's not sharp object to cause immediate injury.

- [91]. I once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. The only issue in this trial is whether the accused had touched the complainants breast, penetrated her vagina and her mouth with his penis.
- [92]. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant and the four (4) prosecution witnesses as truthful and reliable. The complainant told the truth when she said that the accused pulled her hand into the house, touch her breast and took off her skirt, shorts and panty and inserted his penis into her vagina and her mouth
- [93]. I accept that the evidence of Manaini (PW2) and Adi Makarita (PW3) to be consistent to the evidence of the complainant as they both confirmed the evidence of the complainant on what the accused had done to her, Particularly the evidence of Manaini (PW2) in which she said she saw the accused on that day inside the house sitting on a mattress and spoke to him.
- [94]. I also accept the evidence of the (DW4) Doctor Salome who had examined the complainant after the incident and confirmed that the injury observed on the examination is related to sexual penetration or penile penetration. The medical report of the complainant was tendered as part of Prosecution evidence.
- [95]. I also accept the evidence of [PW5] Nanise Tinai who has tendered the National Medical Card of the complainant which contains her date of birth on 22<sup>nd</sup> of February 2014. This confirms that complainant was 10 years old at the time of the offending.
- [96]. I have no doubt in my mind that all the prosecution witnesses told the truth in court and their demeanor was consistent with their honesty. All the prosecution witnesses were also able to withstand cross examination and were not discredited as to the main version of their evidence and observations. The defence did not raise any motivation by the prosecution witnesses in falsely implicating the accused for the offences of Indecent assault and **rape** of the complainant.
- [97]. The issue in this trial is whether the accused was present at the scene of crime at the time of the alleged commission of the offences. The complainant confirmed that it was the accused who appeared from inside the house when she was calling the canteen owner "Mere". The accused pulled the complainant into the house, kissed her cheek, forcefully removed her skirt and pulled down her shorts and panty and inserted his penis into her vagina and later inserted his penis into her mouth. Manaini (PW2) also confirmed that she came to the house to buy items the same



morning and saw the accused seating on a mattress in the living room. She also saw the complainant seating near the door. When she left the place the complainant followed her and told her what the accused had done to her. Manaini also confirmed that she spoke to the accused who told her that the Mere and her husband left for Sigatoka.

- [98]. I am of the view that there was no reason for prosecution witness 1 and 2 to lie in their evidence. Their evidence was consistent, credible and reliable. I refuse to accept the denial of the accused in his evidence that he was not at the house on the day in question. I also refuse to believe the evidence of DW2 who was the Alibi witness as part of her evidence cannot confirm the exact date and year the accused came to visit her.
- [99]. This court accepts the evidence of all the prosecution witnesses as reliable and credible. On the other hand, this court rejects the defence version of denial as not credible, unreliable and not truthful. The defence has not been able to create a reasonable doubt on counts 1, 3 and 4 in the information of the prosecution case.

## **CONCLUSION**

- [100]. This court is satisfied beyond reasonable doubt that the accused Ilaisa D on the 30<sup>th</sup> of September 2023 unlawfully and indecently kissed the cheek of "AM". This Court is **not** satisfied beyond reasonable doubt that the accused Ilaisa Dau on the 30<sup>th</sup> of September 2023 unlawfully and indecently touched the breast of "AM".
- [101]. This Court is satisfied beyond reasonable doubt that the accused Ilaisa Dau on the 30<sup>th</sup> of September 2023 penetrated the vagina of "AM" with his penis, a girl below the age of 13 years. This Court is satisfied beyond reasonable doubt that the accused Ilaisa Dau on the 30<sup>th</sup> of September 2023 penetrated the mouth of "AM" with his penis, a girl below the age of 13 years.
- [102]. In view of the above, I find the accused guilty of first count of Indecent Assault, Not guilty on the second count of Indecent Assault, guilty on the third count of Rape and guilty on the 4th count of Rape. I convict the accused accordingly for the said three counts.

- [103]. The decision of the Court are as follows;

1<sup>st</sup> Count – Indecent Assault - Guilty

2<sup>nd</sup> Count – Indecent Assault - Not Guilty

3<sup>rd</sup> Count – Rape – Guilty


4<sup>th</sup> Count – Rape - Guilty.

[104]. This is the judgment of the court



**AT Lautoka**

19<sup>th</sup> of November 2024

  
.....  
**Sekonaia V. Vodokisolomone**  
**Acting Puisne Judge**

**Solicitors**

**Office of the Director of Public Prosecutions for State**  
**Office of the Legal Aid Commission for the accused.**