

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 200 of 2023

STATE

V

ISEI VAVA

Counsel : Ms. M. Lomaloma for the State.
: Ms. L. Taukei and Mr. A. Waqavakatoga for the Accused.

Dates of Hearing : 09 July, 2025
Closing Speeches : 10 July, 2025
Date of Judgment : 14 July, 2025

JUDGMENT

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

1. The Director of Public Prosecutions charged the accused by filing the following information dated 7th February, 2024:

COUNT ONE

Statement of Offence

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

Particulars of Offence

ISEI VAVA between the 1st day of May, 2023 to the 31st day of May, 2023, at Nadi in the Western Division, penetrated the vagina of “G.X” with his tongue, a child under 13 years of age.

COUNT TWO

Statement of Offence

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

Particulars of Offence

ISEI VAVA between the 1st day of May, 2023 to the 31st day of May, 2023 at Nadi in the Western Division, unlawfully and indecently assaulted “G.X”, by touching her breast.

COUNT THREE

Statement of Offence

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

Particulars of Offence

ISEI VAVA between the 1st day of May, 2023 to the 31st day of May, 2023 at Nadi in the Western Division, unlawfully and indecently assaulted “G.X”, by touching her buttocks.

2. In this trial, the prosecution called one witness and after the prosecution closed its case, this court ruled that the accused had a case to answer for the lesser offence of indecent assault and not for the offence of sexual

assault in count two as charged. There was no evidence in respect of counts one, and three.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

ELEMENTS OF THE OFFENCE

INDECENT ASSAULT

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

7. Assault is the unlawful use of force on the complainant by touching her breast.
8. The accused has denied committing this offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant by touching her breast.
9. If this court is satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then this court must find the accused guilty. However, if there is a reasonable doubt with respect to any elements of the offence of indecent assault then this court must find the accused not guilty.

ADMITTED FACTS

10. 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 admitted facts as accurate, truthful and proven beyond reasonable doubt.
11. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

12. The complainant informed the court that she was born on 6th July 2010, and that in May 2023 she was 12 years old and in year 6. She has one

stepsister and one biological sister. The accused is her stepfather. In May 2023, the complainant and her sister Adi, came to reside with their mother, stepsister, and the accused at Nawaicoba, Nadi.

13. The complainant began attending school in Nawaicoba. One night, when the complainant went to change her clothes in the accused's bedroom, where all her personal belongings were kept, the accused was in the room. He approached the complainant and touched her breast over her clothing. Prior to this act, the accused told the complainant not to inform her mother or the police. In addition to the above, after the act the accused again told the complainant not to tell her mother.
14. The complainant was certain that it was the accused, as she was alone with the accused that night. After the accused touched her breast, the complainant felt angry. She did not tell her mother at the time, however, on one occasion, she told her school teacher, Ms. Bulou, when questioned about her absence from school. The complainant recognized the accused in court.
15. In cross-examination, the complainant agreed that in October 2023, she told her school teacher about what the accused had done to her in May 2023. This information was given by the complainant after she was questioned by Ms. Bulou regarding her absence from school the day before. The complainant agreed that, on the day she was absent from school she had walked for more than an hour with her younger sisters from Nawaicoba to Tunalia, to her uncle's house. The accused, was working on the farm, met the complainant at uncle Samuel's house at approximately 6pm that day.

16. The complainant agreed that when the accused became aware that she and her sisters had missed school, he scolded and smacked her. The complainant also agreed that there was no relationship of any kind between her and the accused. She stated that she did not like the accused, and that his act of smacking her and her sisters at her uncle's house made her angry.
17. The next day, when she went to school, her school teacher asked why she had been absent from school. The complainant agreed that, because she was angry with the accused, she had fabricated the allegation against him. However, upon further questioning when it was suggested that the accused had not done what she had alleged in court the complainant responded "*I did not make it up.*"
18. The complainant stated that the accused began scolding and smacking her from the time she started living with him in May. She hated him for this, as he was her stepfather who had no authority to discipline her in such a manner. The complainant also observed that the accused would scold her mother, which she hated as well. When questioned that she never told her teacher that the accused had touched her breast in May, the complainant agreed.
19. The complainant also agreed to the suggestion that the only reason she alleged the accused had touched her breast was because he used to scold and smack her whenever she misbehaved.
20. Upon re-examination, the complainant denied having fabricated the allegation that the accused had touched her breast.
21. This was the prosecution case.

DEFENCE CASE

22. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider his evidence and give such weight as is appropriate.
23. The accused informed the court that the complainant is his stepdaughter. In 2023, he was employed as a caretaker of a farm in Nawaicoba, Nadi. At the time, he was living with his wife, (the complainant's mother) and their child.
24. In May 2023, the complainant and her younger sister, Senimoli, came to stay with the accused and his family. The accused stated that he treated both his stepdaughters as his own children. He further stated that he disciplined the complainant by smacking her when she did not listen to him. The accused denied the allegation made by the complainant.
25. According to the accused, one day in October 2023, he went to Tunalia to work in the farm. At approximately 6pm, when he arrived at his brother's house in Tunalia, he saw the complainant, Senimoli and Rajjeli there. The children had not gone to school that day, but had instead walked from Nawaicoba to Tunalia. Upon questioning them, the accused was informed that they had chosen to visit their uncle rather than go to school. The accused stated that he became angry, physically disciplined all the children, got them in a car, and returned to Nawaicoba.
26. In cross-examination by the state counsel, the accused denied that the complainant and her younger sisters kept their personal belongings in his bedroom. However, he acknowledged that the complainant would

sometimes enter his bedroom to change her clothes. The accused denied touching the complainant's breast in his bedroom. He only came to know that the complainant had told her school teacher about the allegation from the police. The accused further denied that his references to discipline and smacking were an attempt to conceal his alleged conduct. He maintained throughout his testimony that he did not touch the complainant's breast as alleged.

27. This was the defence case.

ANALYSIS

28. The prosecution states that the 12 year old complainant and the accused knew each other. The accused is the complainant's step father, and at the time of the alleged incident, the complainant was living with the accused, her mother and two young sisters.
29. The prosecution alleges that one night in May 2023, the complainant and the accused were alone in the house. The complainant's clothes and personal items were kept in the accused's bedroom, so she went to change her clothes. As she was about to do so, the accused approached her and touched her breast from over her clothing. The complainant did not like what the accused had done. In effect the conduct of the accused had angered her. The accused told the complainant both before and after the incident not to tell her mother and/or the police about what he had done.
30. The complainant was afraid of what the accused had done, and due to his continued aggression such as scolding and assaulting her, she did not tell her mother or anyone.

31. As days passed, the complainant had an opportunity in October, 2023 when her school teacher questioned her about her absence from school the previous day. At that moment, the complainant gathered courage to inform her teacher, Ms. Bulou, that her stepfather had touched her breast in May 2023. The matter was subsequently reported to the police.
32. On the other hand, the defence contends that the allegation is a carefully fabricated story by the complainant against the accused. The accused denies having done anything to the complainant as alleged. The defence further argues that the account given by the complainant in court is neither possible nor probable, and therefore, her evidence should not be accepted.
33. The defence is asking the court to consider that the complainant had animosity towards the accused, arising from his attempts to discipline her. As a concerned father the accused would scold, and even smack the complainant when she did not listen to him and misbehaved.
34. The defence submits that the complainant was attending school regularly and was not under any pressure from the accused. The evidence, as presented, shows that when the complainant missed school, she was disciplined by the accused. The accused was concerned not only about her absenteeism, but also that she had walked for over an hour from home in Nawaicoba to Tunalia, accompanied by her two younger sisters to visit their uncle.
35. The defence argues that the complainant, motivated by anger and hatred towards the accused, fabricated a false allegation when questioned by her school teacher regarding her absenteeism.

36. Finally, the defence submits that what the complainant told the court does not make sense and is fraught with doubt. The defence urges the court not to believe the complainant who is driven by a motive against the accused, thereby separating him from her mother and family.

DETERMINATION

37. At the outset, I would like to mention that the evidence of the complainant not related to the information filed has been disregarded completely. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
38. In this case, there are two different versions, one given by the prosecution and the other by the defence. This court must consider all the evidence adduced to decide whether the prosecution has proven beyond reasonable doubt that the accused committed the offence alleged. It is not for this court to decide who is acceptable between the complainant and the accused.
39. This court has kept in mind the following factors when determining the credibility and reliability of a witness such as promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in court [and the evidence of corroboration where it is relevant] see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022).

40. Brennan J in *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 has discussed the appropriate approach to be taken where there are conflicting versions of evidence given by the prosecution and the defence witnesses. Brennan J held that:

“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is “a gross simplification.”

41. The court has also taken into account the observations made by the Court of Appeal in *Rokocika v The State* [2023] FJCA 251; AU0040.2019 (29 November 2023) regarding what the accused told the court. At paragraph 45 the Court of appeal had stated as follows:

The Liberato direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused’s account (second aspect): Park v R [2023] NSWCCA 71 at [102]–[103].

42. I have also kept in mind the observations made by Prematilaka RJA sitting as a single judge of the Court of Appeal in *Josaia Naikalivou vs. The State*, AAU 017 of 2022 (26th March, 2024) at paragraph 9 as follows:

In Murray v The Queen (2002) 211 CLR 193 at 213 [57] Gummow and Hayne JJ, in the High Court of Australia made it clear that it is never appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt. In R v Li (2003) 140 A Criminal R at 288 at 301 it was again held that the issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth. This seems to be what exactly the trial judge had done in the judgment.

43. The defence argument apart from denial is that there was a motive on the part of the complainant to make a false allegation against the accused since she had an anger and hatred against the accused.

44. In respect of the above contention, I have directed my mind to the *Jovanovic* direction to remind myself that an accused has no burden to prove a motive or reason for a complainant to lie.

45. The Court of Appeal in *Rokocika's* case (supra) from paragraphs 32 to 34 made a pertinent observation in respect of the above as follows:

In R v Jovanovic (1997) 42 NSWLR 520 Sperling J set out a draft direction that emphasised that:

“It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about’.

[33] The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:

‘If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: Jovanovic v R at 523.

[34] NSW Criminal Trial Courts Bench Book also states that:

‘A motive to lie or to be untruthful, if it is established, may “substantially affect the assessment of the credibility of the witness”: ss 103, 106(2)(a) Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury’s task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: South v R [2007] NSWCCA 117 at [42]; MAJW v R [2009] NSWCCA 255 at [31].’

46. There is no dispute that the accused is the stepfather of the complainant and both were living in the same house. At the time of the allegation the complainant was 12 years of age and educated up to year 6.
47. After carefully considering the evidence adduced by the prosecution and the defence, I do not find the complainant's evidence to be credible or reliable. Her narration lacks logical consistency and appears to be influenced by her personal animosity towards the accused.
48. During cross-examination, the complainant admitted her dislike of the accused, and the circumstances strongly suggest that her complaint to the school teacher was fabricated. In light of these factors, I am not prepared to give any weight to the evidence of the complainant in respect of the allegation. It is apparent that she carried a personal grudge against the accused, which she has effectively prosecuted through the present allegation.
49. It was further observed that the complainant was not a consistent witness. Her testimony swayed, she made one assertion during her evidence taking, reversed and contradicted her position during cross-examination, and subsequently reaffirmed her earlier account. This sequence created the impression that she was attempting to reconcile inconsistencies to restore her credibility. The overall effect of her evidence raises more questions than answers. Notably, in response to one cross-examination question, the complainant agreed that she had not informed her school teacher that the accused had touched her breast.

LATE REPORTING

50. Furthermore, there is an issue of late reporting by the complainant to the school teacher and the police. According to the complainant the alleged

incident occurred in May 2023, but was reported approximately five months later in October 2023. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018)* had explained this issue as follows:

*“[24] In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-*

“The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”

*“[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of *Thulia Kali v State of Tamil Nadu*; 1973 AIR.501; 1972 SCR (3) 622:*

“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful.

Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”


51. Although not raised by counsel in their closing submissions, the evidence before the court indicates that the alleged incident occurred in May 2023, while the complaint was made to the school teacher in October of the same year. Accordingly, the court is obliged to consider whether the timing of the complaint, as stated by the complainant in her evidence, falls within a reasonable period. It is noted that the complainant was not questioned regarding the delay in lodging the complaint.
52. Firstly, based on the evidence adduced, it can be inferred that the accused held a position of authority within the household. He was the complainant’s stepfather, and both lived under the same roof.
53. Secondly, the evidence also supports the inference that the accused was the sole breadwinner of the family. He had informed the complainant not to tell her mother or the police about what he had done.
54. Thirdly, based on the accused’s own evidence that he regularly used force to discipline the complainant, I am satisfied that such conduct instilled

fear in her mind. In my judgment, this fear contributed to her reluctance to disclose the accused's alleged actions to any other person.

55. I accept that the complainant was a victim of circumstances which contributed to the delay in lodging the complaint. In my view, a delay of approximately five months is reasonable in the context of the evidence before the court. However, as the school teacher was not called as a witness, the content and nature of the complaint made by the complainant could not be independently verified.
56. While I accept that the delay of approximately five months in making the complaint is reasonable given the complainant's circumstances, however, this does not resolve the issues concerning the credibility and reliability of her evidence when viewed in its entirety. It is apparent, and I accept the defence submission that the complainant had a motive to falsely implicate the accused.
57. On the other hand, the accused gave evidence that I find to be both credible and reliable. He remained consistent under cross-examination and was not discredited. The accused was also honest in disclosing his manner of discipline on the complainant.
58. In the circumstances, this court is not satisfied beyond reasonable doubt that the accused between 1st May, 2023 and 31st May, 2023 had unlawfully and indecently assaulted the complainant by touching her breast.
59. In view of the above, the accused is found not guilty of the lesser offence of indecent assault in count two and he is acquitted forthwith. The accused

is also acquitted of one count of rape and one count of sexual assault as charged due to lack of evidence. The defence has been able to create a reasonable doubt in the prosecution case.

60. This is the judgment of the court.


Sunil Sharma
Judge



At Lautoka

14 July, 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.