

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 68 OF 2024

BETWEEN : **STATE**

AND : **FILIPE YACABECI**

Counsel : **Ms S Bibi & Mr Vaurasi for the State**
Mr I Emasi for the Accused

Hearing : **21 & 22 January 2025**

Closing Addresses : **29 January 2025**

Judgment : **4 March 2025**

JUDGMENT

[1] The complainant has been granted name suppression. Therefore, any public record of these proceedings must not contain any information that may lead to the identity of the complainant. She is referred to as 'TR' in this judgment. I have deliberately avoided identifying details that may lead to identifying the complainant.

[2] The accused is charged with two counts of rape. They are:

Count 1

Statement of Offence

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

Particulars of Offence

FILIPÉ YACABECI on an unknown date between the 1st of February 2022 and the 28th of February 2022 at Nakavu village, Namosi in the Central Division, penetrated the vulva of TR, a child below the age of 13 with his tongue.

Count 2

Statement of Offence

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

Particulars of Offence

FILIPÉ YACABECI on the 28th August 2022 at Nakavu village, Namosi in the Central Division, penetrated the vulva of TR, a child below the age of 13 with his tongue.

- [3] The accused denies having committed the offences.
- [4] The accused is alleged to have raped the complainant, a child under 13 years, on two separate occasions in 2022, the first in the month of February and the second on 28 August. He is alleged to have penetrated the vulva of the complainant with his tongue on both occasions.

Rape

- [5] The offence of rape has three elements: the penetration of a complainant's vagina, anus or mouth by an accused with their penis, finger or an object, the complainant not consenting to sexual penetration, and the knowledge of the accused that the complainant was not consenting.¹ The slightest penetration is sufficient to establish the element of penetration.

¹ Section 207(2).

[6] As the complainant here is alleged to have been under 13 years, it is not necessary for the prosecution to establish that she did not consent or that the accused knew that the complainant did not consent to the penetration.²

[7] To establish the two offences of rape in the present case, the prosecution must prove the following elements beyond a reasonable doubt:

1. On a date between 1 February and 28 February 2022, and on 28 August 2022, the accused penetrated the complainant's vulva with his tongue.

2. The complainant was under the age of 13 years at the time.

Burden of proof and assessment of the evidence

[8] The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence.

[9] The accused chose to remain silent. He has a right to do so. No adverse inference will be drawn from this.

[10] The burden is on the prosecution to prove the charges beyond a reasonable doubt. Each element of the charge must be proved but not every fact of the story. If there is a reasonable doubt, so that the Court is not sure of the accused's guilt, or if there is any hesitation in my mind on any of the elements, the accused must be found not guilty of the charges and, accordingly, acquitted.

Approach to the assessment of the evidence

[11] I approach the evidence dispassionately, without sympathy or value-laden rules regarding how men and women should conduct themselves. It is entirely a matter for

² Section 207(3).

me to decide which witnesses are credible and reliable and which part of their evidence I accept as true.

- [12] The prosecution's case is largely dependent upon the complainant's evidence. She is 11 years old. Her evidence does not require corroboration. If her account of the alleged incidents is true, then the accused is guilty of the charges. However, if her account is false or may be false then the accused is not guilty.
- [13] The prosecution must prove beyond reasonable doubt all the elements of the alleged offending, including that the accused is the person alleged to have committed the offending.

Prosecution Evidence

- [14] The accused admitted a number of facts, including the following:
- i. The accused is the grand uncle of the complainant. They are known to each other.
 - ii. The complainant was aged 9 years old at the time of the alleged offending (as per the date in her birth certificate which was produced by consent).
 - iii. The accused is known to the children by the nickname 'Tua Yaca'
 - iv. Both the accused and the complainant lived in the same village - the accused lived in a red and blue coloured house situated on a hill.
 - v. The alleged offending was first reported to the Navua Police Station on 2 October 2023.
- [15] The prosecution made a number of preliminary applications in respect to the evidence of the complainant and her friend, both aged 11 years. The evidence was to be given in closed court with a screen being placed between the witness and the accused whilst the

witness gave evidence. Further, counsel and the court to de-robe and the court to sit at the same level as the two young witnesses. The accused did not object and, accordingly, the orders were granted.

[16] The prosecution called three witnesses, namely:

- PW1 - the complainant.
- PW2 - the complainant's friend.
- PW3 - the complainant's mother.

[17] The complainant's evidence in examination-in-chief was as follows:

- i. The prosecutor put a number of questions to the complainant to test whether she understood the difference between telling the truth and telling lies. The complainant demonstrated that she understood the difference
- ii. She is currently 11 years old. Her birth certificate was produced as **Prosecution Exhibit 1**. She lives in a house in the village with her grandfather, her parents and her siblings. The accused comes from the same village as her grandmother and is known as 'Ta Yaca'.
- iii. In 2022, the accused often came to stay in the village and would live in the red and blue coloured house on the hill. The complainant stated that she did not like the accused but stated that he had not done anything to her and that she was not scared giving evidence.
- iv. It took a little time for the prosecutor to elicit the matters that were the subject of the charges. The complainant had been asked whether the accused had done any bad things to her to which TR answered 'no'. Was TR sure? She answered 'yes'. The complainant was subsequently referred to the fact that a matter was reported to the police in 2023 - it was at this point that TR began to speak of the circumstances of the accused's alleged offending. She confirmed that the letter

explained that the accused had done some bad things. She confirmed that these bad things were done to her. She stated that the bad things were that the accused had licked her 'ura' on two occasions.

- v. The complainant proceeded to describe the circumstances of the 'first' incident – as per count 1. She, two of her siblings and two friends had gone to the youth house to drop the accused's tools. She was unable to say when or how old she was at the time that this occurred. She stated that when she got there she took off her shoes and was playing with the other children for some time. At some point she went home but had forgotten her shoes. She returned to the house to retrieve her shoes. By this time it was dark. The distance from her house to the youth house was not far, described as being the distance from the witness box to the civil registry downstairs, about 30 meters or so. The youth house had one room. The room was dark. As she was retrieving the shoes from the room the accused, who was hiding, grabbed her. He had been standing, leaning beside the wall. He grabbed her, picked her up from the waist and placed her on a mattress which was in the room. The accused then removed her pants and panties before proceeding to lick her 'ura'. She pointed to her 'ura' which was in the area of her groin. A diagram was used for her to identify where the 'ura' was. TR drew a circle around the vagina area of the female figure. She stated that the accused licked the inside of her 'ura' with his tongue and she drew a line where he had done so. She was lying on her back on the mattress when he did this and he was standing in front of her while doing it. The diagram was admitted in evidence as **Prosecution Exhibit 2**. The complainant stated that there was no lights in the room. When he was licking her 'ura' she tried to stand up and go home but he pushed her down back on top of the mattress. She was angry when he had done this. After he had stopped licking her 'ura' she put on her panties, her pants, and her shoes, and walked home. The accused did not say anything to her at this time.
- vi. She later told N and T what had happened but she did not tell her parents because she was scared of her mother. N and T in turn told others, including TR's older brother

- vii. The complainant then proceeded to describe the 'second' occasion that the accused licked her 'ura'. She had come back from school, it was a Friday, and there had been a funeral that day – she could not recall her age at the time. When she got home from school, she put her bag in the bedroom. She saw that the accused was sitting in the sitting room. She went back to her bag to grab her lunch box in order to wash it. As she did so, the accused came into the bedroom and closed the door and the windows. He then picked her up and placed her on the bed. The complainant tried to escape but was unable to do so. The accused then took off her panties and licked her 'ura'. The complainant stated that she was lying on the bed facing up, and the accused was next to the bed. She was provided a diagram and again drew a circle around the 'ura', being the vagina of the female figure and drew a line to identify where the accused licked her. The diagram was produced as **Prosecution Exhibit 3**. The complainant stated that she was angry and felt pain in her 'ura'. The complainant stated that her friend, PW2, saw them and then went and told N and that N and P came to the bedroom. The complainant stated that the accused stopped licking her ura when the others came into the bedroom. The accused then left the house. After this, the complainant went and washed her lunchbox, changed out of her uniform and went and played.
- viii. She did not tell anyone what had happened because she was concerned that if she did, then her parents would find out and she was scared of this. She feared that she would be smacked. She stated that her mother reported the matter to the police and that her older brother had told their mother what had happened. Her brother had found out from the others.

[18] In cross-examination, the complainant stated:

- i. The distance between the youth house and her own home was close. The youth house is in the village. There is a room in the house where carpentry tools are stored. She stated in response to the question whether the accused called her into the room, that he did not call her but pulled her. She was asked whether

she had asked for money from the accused to which she replied yes. She was asked whether the accused asked her to get onto the mattress to which she said no, that the accused picked her up. It was put to her that the accused told her to remove her panties but she stated that he took them off. It was put to her that after he took off her panties, he became afraid and then told her to get dressed and leave. After some clarification, the complainant agreed, as well as agreed that she had purchased noodles with money provided by the accused and that she had eaten the noodles at N's house.

- ii. The second incident was then discussed. It was put to the complainant that the accused had stayed in the sitting room until the accused's daughter came to get him. The complainant responded that the accused was in the bedroom. She also stated that PW2 had opened the door, come inside the room, and had seen the accused lick the complainant's 'ura' and then ran to N and that N then called P (P being the accused's daughter).

[19] In re-examination, the complainant explained that when the accused asked her to leave this happened on a different, and earlier, occasion to the first incident. She could not recall whether the accused had given her money on the occasion when he told her to leave or when he licked her 'ura'. Nor could she recall why he gave her money.

[20] The second witness, PW2, is also 11 years old. Her birth certificate was produced as **Prosecution Exhibit 4**. She lives in the house next to the complainant's home. Her examination-in-chief was as follows:

- i. Again, due to her age, the prosecutor put a number of questions to PW2 to test whether she understood the difference between telling the truth and telling lies. The witness demonstrated that she understood the difference.
- ii. PW2 had gone to the complainant's house on a particular day – she thought it was in either 2022 or 2026. It was in the afternoon and still daylight. The

living room in the house was empty and so she went to the bedroom. She saw the complainant lying on the bed and the accused was licking her private parts. The complainant was lying on top of the mattress while the accused was kneeling down very close. She described TR's private parts as 'vono' and explained that this is where a person urinates.

- iii. PW2 ran from the house and saw N and P. She told them what had happened and they went back to the complainant's house to see. PW2 stated that P cried – P is the accused's daughter. The complainant then ran out of the house and P hit the complainant's head. Everybody then left.
- iv. PW2 did not tell her parents about the matter as in her mind she had already told N and P and thought they would tell the parents.
- v. She was able to see that it was the accused licking the complainant's private parts because it was a bright day with sunshine and she saw him properly along with the complainant. She confirmed there was no one else in the house and no one else in the bedroom. She stated that both the complainant and the accused had seen her when she came into the room.

{21} In cross-examination, PW2 provided the following evidence:

- i. She confirmed she had seen P crying. She was shown her police statement where there was no mention of P crying. PW2 stated that P did cry and stated that maybe she forgot to tell the police.
- ii. She clarified that when she said that P gave the complainant a hiding, she meant that P had slapped the complainant. She accepted that she did not say this in her police statement.
- iii. She had stated in her police statement that she did not think that the accused and the complainant had seen her when she looked in the room. This was inconsistent with her evidence in court.

- iv. It was put to PW2 that the accused was not inside the bedroom but was in the living room. PW2 maintained that the accused was inside the bedroom. She confirmed that the accused had his back to her and that she suspected it was the accused.

[22] In re-examination, PW2 explained that she did not tell the police about P slapping the complainant or that P cried. She stated that she forgot. She stated that she was able to confirm that it was the accused that was in the bedroom as both he and the complainant had looked at her when she went in the room. As there was a question over whether PW2 was referring to the accused (in terms of the person licking TR's vagina), PW2 was asked to describe what the accused looked like. She stated that he was tall, brown, bald and fat. She named his four children, including P. She confirmed that she would be able to recognise the person and was led around the courtroom and was able to identify the person as being the accused who she saw behind the screen.

[23] In response to questions from the Court, PW2 stated that N was a child whereas P was at secondary school.

[24] The third and final witness for the prosecution, PW3, is the complainant's mother. She has six children including the complainant. The eldest is a boy. She stated in examination-in-chief:

- i. She was in court because of a matter that she had reported to the police when it came to her attention that her daughter, the complainant, had been molested.
- ii. The matter came to her attention when she was at home with her children. Her oldest son was arguing with the complainant and said that the complainant had done something wrong and that she needed to own up to it. The complainant told him to be quiet and stated that she had done nothing wrong. PW3's son

stated that the complainant needed to tell their mother. PW3 then questioned the complainant.

- iii. PW3 stated that she reported the matter to the police.
- iv. She stated that prior to this, there had been no family disputes between her family and the accused's family and that they had a very tight-knit relationship. She stated that she trusted her children with the accused and his wife and that at times they stayed at the accused's home.
- v. The last time PW3 had seen the accused was after the matter was reported to the police. The accused had come to her house wanting to apologise and seeking forgiveness from her family. PW3 stated that *'I questioned him about what has transpired. And he confessed to saying that he is sorry for what he has done to my daughter'*.

[25] In cross-examination, PW3 agreed that the accused came to ask for forgiveness because of rumours of allegations against him. She disputed that the first time she asked her daughter about the allegations, she denied it. The police statement was put to her wherein she stated that she asked the complainant about the matter and she had, at first, denied that the accused had done bad things to her. There was some confusion as to whether PW3 was referring to the quarrel between the complainant and her oldest son or when PW3 had asked the complainant herself. The police statement suggesting the latter.

[26] The prosecution then closed its case

[27] I informed the accused that I was satisfied there was evidence of each element of the two offences and, therefore, there was a case for him to answer. I put the three options to him; to provide sworn evidence, to remain silent and to call witnesses. The accused stated that he wished to remain silent and did not wish to call any witnesses.

Analysis of evidence and determination

- [28] I am satisfied that TR was under the age of 13 years at the time of the alleged offending. Her birth certificate is proof of this. Thus, lack of consent is not required to be proven by the prosecution. It suffices for the prosecution to prove beyond reasonable doubt that the accused penetrated TR's vulva on the two occasions in 2022.
- [29] I remind myself that the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. The defence did not call any evidence. That is the accused's right.
- [30] My assessment of the evidence from PW1, PW2 and PW3 is critical to the outcome of the charges against the accused. I keep 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, and the demeanour and deportment in court - see *Matasavui v State* [2016] FJCA 118; AAU0036,2013 (30 September 2016), *State v Solomon Qurai* (HC Criminal - HAC 14 of 2022).
- [31] The complainant's evidence does not require corroboration. If I accept TR's evidence as true, then the accused is guilty of the two offenses for which he has been charged. As it is, the evidence of PW2 corroborates the complainant in respect to count 2. As both were only 11 years old when they gave evidence, it is helpful (before assessing their evidence) to note the following remarks by Rajasinghe J in *State v SS* [2024] FJHC 133 (23 February 2024):

13 ...it is prudent to briefly discuss the applicable approach in evaluating the evidence of child witnesses. The Fiji Court of Appeal in Alfaaz v State [2018] FJCA 19; AAU0030,2014 (8 March 2018) held that:

"In R v Powell [2006] 1 Cr.App.R.31, CA it was held inter alia that infants simply do not have the ability to lay down memory in a manner comparable to adults and special effort must be

made to fast-track such cases. I think the same reasoning is applicable to a child of 07 years as well. Therefore, one would not expect perfectly logically arranged evidence in the case of a child witness particularly when the child is the victim of the crime and probably carries both physical and psychological scars with her.

It had been remarked regarding an adult victim of rape in Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 380) that:

"(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."

The Supreme Court in Ludu v State Criminal Petition No. CAV0035 of 2016: 21 July 2017 [2017] 1 JSC 19 said referring to Bharwada in the context of apparent discrepancies in an adult rape victim's recollection but which do not shake the basic version. 'Their evidence is not a video recording of events.' In my view, one has to be even more generous with and understanding of the evidence of a child witness who may have been traumatized by a completely alien experience in cases of rape and other forms of sexual assaults affecting her ability to narrate the incident in graphic details"

14. Given the above passage of Premathilaka JA in Alfaaz v State (Supra), it is essential to note that children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for many reasons, such as age

and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what they are describing and may not have the words to describe it. They may be embarrassed to talk about incidents of a sexual nature or use words they think are bad and, therefore, find it difficult to speak.

15. A child may not fully understand the significance of sexual activities, which may be reflected in how they remember it or describe it. A child's memory is different from that of an adult. A child's memory can fade even within the short term. When recounting events later, even after a reasonably short time, a child's recall of when and in what order events occurred may not be accurate. A child may be unable to speak of the context in which those events happened. A child may have difficulty dealing with conceptual questions such as how she/he felt some time ago or why she/he did or did not take a particular course of action.

*16. Accordingly, evidence of the child witness must be evaluated by referencing factors appropriate to her strengths and weaknesses related to her age, mental development, understanding and ability to communicate. (vide: *Nulawa v State* [2021] FJCA 188; AAU014/2016 (23 June 2021)).⁷*

[32] The complainant was only 9 years old when the alleged offences occurred. She states that the accused grabbed her when she was retrieving her shoes from the youth house and that he proceeded to remove her clothes and penetrate her 'ura' with his tongue. It is clear from her description and her drawing, that her 'ura' is her vagina. It is also clear from the description that the accused penetrated her vulva (TR stated that the accused licked inside her ura on the first occasion and that she felt pain in her ura on the second occasion when the accused licked her). The prosecution allege that the first offence occurred in the month of February 2022. The complainant also states that sometime later on the day of a funeral (which the prosecution allege was 28 August 2022) she went home after school. She saw the accused in the living room. No one

⁷ My emphasis.

else was inside the house. As she was grabbing her lunchbox from her bag in the bedroom the accused came into the bedroom, shut the door and windows, and put her on the bed. He then removed her panties and again licked her vagina, penetrating it with his tongue

- [33] I am satisfied that the complainant understood the difference between telling the truth and telling lies. I am equally satisfied that at least from her perspective she was providing what she considered to be the truth. Her evidence was given in a clear manner. It took a while for TR to get into her description of the alleged offending. To begin with, TR stated that the accused had done nothing bad to her and confirmed this when asked whether she was sure. However, I put this down to her age and the strange and new environment she found herself in when she was giving evidence. Once TR properly understood that she was in court to talk about the alleged offending, there was no hesitation in her descriptions and evidence. Her manner and demeanour were age appropriate. She used gestures to help with her descriptions. She spoke in a strong voice yet was appropriately subdued when explaining that she did not tell her parents of the offending because she was scared her mother would smack her. It appeared to me that the complainant was taking her time to answer questions in order to provide accurate information.
- [34] That said, the offending was not reported until more than a year later. The defence argue that the delay undermines TR's credibility as does the inconsistency between her account and PW3's account as to how the matter came to light. TR told the Court that her brother told PW3 what the accused had done. PW3 stated that while TR's brother had alluded to something it was TR who told her of the accused's alleged offending. In my view, there is a reasonable explanation for the delay and the apparent contradiction. TR stated that she was too scared to tell her parents as she feared being smacked. That is natural for a child. The apparent contradiction as to how and who informed PW3 is not, in my view, a contradiction. TR's brother caused the matter to come to light by quarreling with TR and telling her to tell PW3.
- [35] Of greater concern to the Court, however, are the inconsistencies in TR's account of the first incident. She accepted in cross examination when talking about the first

incident that the accused had told her to leave and had not licked her vagina when (as per the question that was put to her) the accused *'became afraid, was scared, and he told you to get dressed and to leave the youth house'*. In re-examination, she stated that this occurred on a separate occasion. There were more inconsistencies with PW2's evidence. These included contradictions between her statement to the police and her evidence in court. PW2 did not inform the police that P had slapped the complainant or that P was crying. There was also some question whether the accused and the complainant had seen her when she looked into the bedroom and saw the accused licking the complainant's vagina.

- [36] This Court is permitted to take into consideration any inconsistencies to consider whether a witness is believable and credible. It is obvious that the passage of time can affect one's accuracy of memory. It cannot be expected that every detail will be the same from one account to the next. If there is an inconsistency, it is necessary to decide, firstly, whether the inconsistency is significant and, secondly, whether the inconsistency 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. If there is an acceptable explanation for the change, then this Court may conclude that the underlying reliability of the witness' evidence is unaffected. If the inconsistency is fundamental, then it is for this Court to decide to what extent it influences the reliability of the witness' evidence. The following remarks from Rajasinghe J in *State v Chand* [2024] FJHC 108 (23 February 2024) are helpful:

30. Gamlath JA in State v Serelevu [2018] FJCA 163; AAU141,2014 (the 4th of October 2018) has extensively discussed the issue of delay in reporting. His Lordship found that "the totality of the circumstance test" is the correct approach to evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.

31. *The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence if there is an unsatisfactory explanation for the delay or unexplained delay. (vide; Musei v State [2022] FJCA 10; AAL131,2017 (3 March 2022)).*

[37] It is necessary when assessing the veracity of a witness' evidence to look at the totality of the picture. With respect to count 1, TR explained the fact that the accused told her to leave (and did not lick her 'ura') as being an earlier separate occasion. She remained steadfast in her recollection that the accused pulled her into the room, removed her pants and panties and licked her ura. The problem that I have is in terms of the reliability of her memory. I am satisfied that she recalls that the accused licked her ura but I am unsure whether she is conflating the facts of the second incident with the earlier occasion when the accused told the complainant to put on her panties and leave. I note that TR's description of the circumstances of the accused licking her ura on the first and second occasion are very similar. He picked her up, carried her and placed on her a mattress. She was facing up. She tried to get away but he made her lie down. These matters occurred 2½ to 3 years ago and given the matter was not reported to the police until October 2023, TR would not have been asked to provide her recollection until 12-18 months after the two alleged incidents. For an adult, that period of delay would certainly impact on their recollection. For a child of 9 years, much more so. Particularly, where there were (if I am to accept TR's evidence) 3 similar alleged incidents, one of which was not mentioned until her cross-examination. I have no doubt given TR's age at the time of the alleged offending and her age when she gave evidence that she will struggle to recollect which facts arose on which occasion – and whether there were 2 or 3 incidents.

[38] With respect to count 2, the inconsistencies by the complainant and PW2 were minor and did not undermine the core aspects of their evidence. The complainant was adamant that the accused went into the bedroom on the second occasion as was PW2. Neither witness departed from their recollection that the accused licked the complainant's vagina. The complainant saw and felt it, PW2 saw it – PW2 can corroborate TR's

evidence that the accused licked TR's vagina but cannot corroborate whether the accused penetrated TR's vagina with his tongue. The admission by the accused to the complainant's mother, PW3, is consistent with the complainant's evidence. PW3 stated that she had *'questioned him about what has transpired...he confessed to saying that he is sorry for what he has done to my daughter'*. I found PW3 to be an honest witness. She stated that her family and the accused's family were very close. I do not overlook her acknowledgement in cross-examination that the accused had sought forgiveness in regards to *'rumours of the allegations against him'*.⁴ That rather broad acknowledgement in my view, does not displace or undermine her evidence that she questioned the accused about the matter and he confessed and apologized for what he had done to TR.

Conclusion

- [39] Having listened to the evidence of the prosecution witnesses I am sure that the accused penetrated the vulva of TR in TR's home sometime in 2022 – as per count 2. I found TR's evidence on this to be credible and reliable. PW2 corroborated the complainant's evidence in this respect. On the other hand, I cannot be sure that TR's recollection regarding the first incident, which is the subject of count 1, is correct. I have a reasonable doubt whether TR's recollection of the events regarding the first incident are not adversely affected by the passage of time between the date the incident allegedly occurred and when she was required to recall the details in late 2023. The fact that there may have been 3 incidents, one of which the accused did not act on his intentions, serves to confuse matters and raise doubts in my mind.
- [40] Accordingly, the Court is satisfied beyond a reasonable doubt that (on one occasion in 2022, being the day of a funeral, the accused penetrated the vulva of TR with his tongue being a child under 13 years.
- [41] In view of the above, I find the accused not guilty of count 1 of rape contrary to s 207(1) and (2)(b) of the Crimes Act and, thus he is acquitted. However, I find the accused

⁴ These being the words of defence counsel in his question to PW3.

guilty as charged of count 2 of rape contrary to s 207(1) and (2)(b) of the Crimes Act and he is, accordingly, convicted on this charge.



Solicitors:

Office of Director of Public Prosecutions for the State

Office of Legal Aid Commission for the Accused