

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

CRIMINAL CASE NO: HAC 92 of 2023

STATE

V

**MOHAMMED FERUZ KHAN &
TARAI HARRY BIANEKE**

**Counsel: Mr. Nasa for the State
Ms. Sharma of LAC for the Accused 1
Ms. Reddy P and Ms. Terubea for Accused 2**

Dates of Trial: 3rd to 10th December, 2025
Closing Submissions: 12th of December, 2025
Date of Judgment: 6th February, 2026

The name of the complainants are suppressed. Accordingly, the complainant will be referred to as "RT".

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 One

(Representative Count)

Statement of Offence

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

Particulars of Offence

Mohammed Feroz Khan, between the 1st day of January 2022 and the 31st day of December 2022 at Tawatawa village, Lautoka in the Western division penetrated the mouth of "RT", a child under the age of 13 years, with his penis.

Count Two

(Representative Count)

Statement of Offence

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

Particulars of Offence

TARAI HARRY BIANEKE, between the 1st day of January 2022 and the 31st of December 2022, at Lautoka, at Tawatawa village, Lautoka in the Western Division, aided and abetted Feroz Khan to penetrate the mouth of “RT” a child below the age of 13 years.

Count Three

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (a) of the crimes Act 2009

Particulars of Offence

Mohammed Feroz Khan , between the 1st day of January 2022 and the 31st of December 2022, at Tawatawa village, Lautoka in the Western Division, unlawfully and indecently assaulted “RT” a child under the age of 13 years, by kissing her by the breast.

Count Four

Statement of Offence

AIDING and ABETTING: Contrary to Section 212 (1) of the Crimes Act 2009.

Particulars of Offence

TARAI HARRY BIANEKE, between the 1st day of January 2022 and the 31st of December 2022, at Lautoka, at Tawatawa village, Lautoka in the Western Division, aided and abetted Mohammed Feroz Khan to kiss “RT”s breast, a child below the age of 13 years.

Count Five

Statement of Offence

ATTEMPTED RAPE: Contrary to section 208 of the Crimes Act 2009

Particulars of Offence

MOHAMMED FEROUZ KHAN between the 1st day of January 2022 and the 31st day of December, 2022 at Tawatawa Village, Lautoka in the Western Division attempted to penetrate the anus of “RT”, a child under the age of 13 years with his penis.

Count Six

Statement of Offence

AIDING and ABETTING: Contrary to Section 212 (1) of the Crimes Act 2009.

Particulars of Offence

TARAI HARRY BIANEKE, between the 1st day of January 2022 and the 31st of December 2022, at Lautoka, at Tawatawa village, Lautoka in the Western Division, aided and abetted Mohammed Feroz Khan in attempting to penetrate the anus of “RT”, a child below the age of 13 years, with his penis.

[2] Both accused pleaded not guilty to all the charges against them and the trial commenced and concluded on the 12th of December 2025 with the prosecution calling one 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 6th of February 2026 for judgment.

BURDEN 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 persons to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

[4] The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means that the Court must be satisfied and sure of the accused person’s guilt, before it can express that the accused is guilty.

ELEMENTS OF THE OFFENCE

[5] **Counts 1: Rape: Section 207 (1) and (2) (c) and (3)** The 1st Accused Mohammed Feroz khan is charged with one count each Rape, Sexual Assault and Attempted Rape The law provides that the prosecution must prove the following;

- i) A person
- ii) Penetrated the mouth of the complainant “RT”
- iii) with his penis

Under section 207 (3) states that; for this section, a child below the age of 13 years is incapable of giving consent

3rd Count: Sexual Assault: The 1st Accused Mohammed Feroz Khan is also charge with one count of Sexual Assault. The prosecution must prove the following elements;

- i) A person commits
- ii) indictable offence which is triable summarily
- iii) unlawfully and indecently assaults
- iv) another person.

5th Count: Attempted Rape; the 1st Accused is charge with account of Attempted Rape: The prosecution must prove the following;

- (i) Any Person
- (ii) who attempts
- (iii) to commit Rape
- (iv) commits an indictable offence triable summarily

Second Accused: Tarai H. Bianeke

2nd count: Aiding and Abetting Rape: The 2nd Accused is charged with one count of aiding and Abetting Rape; the prosecution must prove the following beyond reasonable doubt.

- i) Any person
- ii) aided and abetted
- iii) The commission of an offence by another person is taken to have committed the offence.

4th Count: Aiding and abetting Sexual Assault. Same rule applies in that a Person who aided and abetted Sexual assault by another person is said to have committed the offence of Sexual Assault.

6th Count: Aided and Abetted Attempted Rape: The same rule applies in that the person who aided and abetted attempted rape to have committed the offence of Attempted Rape

[6.] **ADMITTED FACTS**

[18] Section 135 of the Criminal Procedure Act deals with “Admission of facts”. The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

[7] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts” for the 1st Accused

Mohammed Feroz Khan:

1. It is admitted that Feroz Khan was 22 years old as at 2023.
2. It is admitted that Mohammed Feroz Khan was known to the complainant through his wife.
3. It is admitted that Mohammed Feroz Khan’s wife and the complainant’s mother are cousin sisters.

Tarai H. Bianeke

1. It is admitted that Tarai Bianeke is 20 years old in 2023
2. It is admitted that Tarai Bianeke is known to the complainant through her cousin sister namely Aokan Lepani.
3. It is admitted that Tarai Harry Bianeke is the complainant’s maternal aunt.
4. It is admitted that Tarai Bianeke and the complainant’s mother are cousin sisters.
5. It is the complainant’s birth certificate is tendered by consent.

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

[8] The prosecution, in support of their case, called the complainant (RT).

[9] The prosecution also tendered to Court the copy complainant’s Birth Certificate as part of the evidence of the prosecution.

Evidence of the Complainant “RT” (PW-1)

[10] She is the complainant and victim in this case. She testified and stated that currently she resides in Kalabu Housing in Suva with her auntie namely Muanata Apisalome and her cousins. She said her age now is 14 years old.

[11] She testified stating that she attends Kalabu Fijian School in year 8. She reiterated that her date of birth is on the 5th of October 2011. Her birth certificate was shown to her and she confirms the same. She tendered her birth certificate as

Prosecution exhibit number 1. She lived at Tawatawa ever since she was six years old, for 5 years when she was in year 5 (11 years old).

[12] She recalled the year 2022, she was living with her mother Okan Lepani at Tawatawa village in Lautoka together with her step father and her stepsister. Her stepfathers name was Etika Pene Suliana. Her step sister's name was Tenoa.

[13] She recalled in the year 2022 an unusual thing happened to her when she was abused by one Feroz Mohammed Khan. She said that Feroz Mohammed Kahn was her auntie's husband. Her auntie's name Tarai Harry Bianeke. She said the couple lived close to their house. According to her, Mohammed Feroz Khan lived with his parents his wife and his sister Ramiza and Aliya.

[14] The complainant explained that the abuse happened when she was spending a weekend with the Mohammed Feroz and family. She said that the incident happened after she was telling stories with Mohammed Feroz sister Ramiza whilst Feroz and the family were drinking kava. It was around midnight at 12.00am

[15] She said Tarai Bianeke her auntie called her and asked her if they could go down to the second house. The second house was about five minutes away from the first house where she was telling stores with Feroz's sister Ramiza. When she enquired why she has to go with her to the second house. Tarai said to go and do something.

[16] She left with her auntie Tarai Bianeke to the second house and Mohammed Feroz came later. When they reached the second house Tarai Bianeke told the complainant to sit beside her. Tarai than asked the complainant if she could do it or she couldn't do it.

[17] The complainant said that the second house consists of one bedroom, a kitchen and a living room. She that there are two doors to the house. They entered through the front door. The lights was situated between the living room. The lights was situated between the living room and the bedroom. She said they sat down in the living room.

[18] She said that Tarai asked her if she could do something or she couldn't. She said that she asked Tarai "what was that" but Tarai kept on asking her to just say if she can or she couldn't. She said she told Tarai that she wouldn't say Yes, if Tarai never tell her what was that.

[19] She said Tarai never mentioned to her what she meant for to do. She said she gave up and she just said "yes" she would do it and just tell her what that was. She said Tarai than asked her that she promised that she will not tell anyone. Tarai than told her to go and get the bible from the room. She said there was light in the bedroom which was coming from the living room. She got the bible from the bedroom and took it to Tarai.

[20] She said Tarai than told her to go to the bedroom. She then went to the bedroom and when she entered she saw Feroz lying on the bed. The light was bright inside the bedroom and she could clearly saw Feroz on the bed. Feroz asked her to come and sit beside him.

[21] She refused to sit near the accused. The accused (her to sit near him. Feroz) stood up and forced complainant. The accused then asked the complainant if he could put his penis inside her mouth. The accused than pulled the complainant's head and he forcefully puts his penis into her mouth for about 20 minutes.

[22] She said the accused stood up and sat, pulled her hair and he laid back and start forcing her with another hand. She said she was scared. He said after that the accused let go of his hand and she started sitting down and cried. Feroz told her not to tell anyone and for her to go and call Tarai to go to Feroz.

[23] She said she started sitting down crying for five minutes. She said she did not tell Tarai what Feroz had done to her when she asked her what happened. She also did not inform Ramiza when Ramiza questioned her. She said she did not tell Ramiza because Tarai and Feroz were there at that time. Also she said she did not know how to tell her and she was also afraid to tell her. She was also afraid of Feroz's parents and that is why she did not inform them.

[24] Again, the complainant could also remember at one time in 2022 they were playing hide and seek near the river together with Tarai, Feroz and her step sister Tenoa. Before they played she said Tarai had forced her to partner with Feroz.

She said Tarai and her step sister Tenoa were doing the counting whilst Feroz took her into the bush and told her to hide and do not make any noise. She said Feroz saw the sarong on her shoulder he took it and spread it behind her back. Feroz forced her to lie down on the sarong

[25] Feroz told her not say anything and not to make any noise. He said Feroz lifted her T shirt and her sports bra and started kissing her stomach and her breast and her neck, she was trying to push the accused Feroz away. She successfully pushed Feroz away from her.

[26] She said she informed Tarai that Feroz was kissing her stomach, her back and her neck. She said Tarai did not say anything, but told her that maybe she should go to Feroz during the night. Later that evening she said she saw Tarai and Feroz conversing with each other.

[27] Tarai called her and told her that Feroz is waiting for her in the sitting room. She said that she told Tarai that she did not want to go to Feroz, however, Tarai forced her to go to Feroz. She said Tarai took her to Feroz. There was a curtain which inside the curtain area there was a mattress where she saw Feroz laid on top of it.

[28] She said, Feroz took her hand and told her to put his penis inside her mouth. She said she was scared of him. She said Feroz took off his pants and underwear and showed her his penis. Feroz than forced her to turn over. Feroz than turned her over. She said Feroz wanted to put his penis into her anus. She said by that time her back was facing Feroz.

[29] She said Feroz removed her pants and panty. After he removed same Feroz tried to put his penis into her anus. She said Feroz was holding her and forcing her not to move and trying to put his penis into her anus. She said after that she stood up wore her pants and went back to the room and called Tarai informing her that Feroz wants to see her. She then went and slept beside her sister.

[30] She said she did not complained to her mother because she knew her mother will not do anything. She said her mother will not believe her. Furthermore, her mother will not do anything because before this incident happened, she told her mother about her stepfather and she did not take any action. She did not report the matter to the police and she told the complainant to keep it within the family.

[31] Later she reported the matter to her fathers' cousin sister and her aunty took her to Suva to report the matter to police. The complainant identified Tarai Bianeke her aunty to be the female person sitting in the accused box by directly pointing at her. The complainant also identified the first accused to be Mohammed Feroz Khan sitting at the accused and pointed at him.

Cross Examination Accused1 by Counsel Ms. Sharma.

[32] She agreed that in the year 2022 she was residing at a house about 20 minutes away from the house of the accused persons. She agreed that the accused family had two houses, one of the two houses are occupied by the accused 1's parents and House No. 2 is occupied by the both the two accused person.

[33] She agreed that she was scared when the accused Mohammed Feroz did a bad thing to her. She grabbed her and put his penis into her mouth. She agreed that her hands and legs were not tied but the accused held her hands.

[34] She said she was too afraid to talk to her parents. She said she did not know where to go. She maintained that the accused had forced her and put his penis into her mouth. She said she did not run out of the house. She said the accused was holding onto her hands.

[35] She said she was scared to bite his penis whilst his penis was inside her mouth for 20 minutes. She said she was afraid to talk to her parents. It was put to her by Defence Counsel that the incident which occurred in the bedroom that night did not happened, she maintained that it happened.

[36] It was put to her despite this alleged incident happened she still remain at Feroz's house. She answered yes. She said that Feroz Mohammed Khan did come

into contact with her. She confirmed that it was her who insisted to her mother to spend the weekend at Tarai's home.

[37] She said she remembered what happened during the hide and seek incident. According she did not approached Mohammed Feroz Khan to play hide and seek with them. She maintained that the incident at the bush did happened. She disagreed with the notion that Feroz had not done anything to her at the bush.

[38] She said that she denied that the reason why she said that Mohammed Feroz had done this bad things to her was because she hated him. She agreed that she did not want to report the matter to her mother because she did not believe that her mother will believe her given the previous incident with her step father.

[39] She said she is not making false allegation against Mohammed Feroz.

Cross Examination Accused 2: Ms. Terubea

[40] She said that Tarai had asked the complainant's mother for permission to take the complainant to her place for the weekend. She said that she had gone to Tarai's place for the weekend together with her stepsister namely Tenoa. She agreed it was almost every weekend.

[41] She agreed that she played hide and seek with them. She disagree with Tarai who said that she wanted to partner with Feroz. She agreed sometimes whilst playing hide and seek the game gets tense and she would get angry with Tenoa and Ramiza. She agreed that Tarai used to growl at her for that.

[42] She disagreed with the suggestion that she was not happy that Tarai was buying things for her sister in law.

[43] She disagreed with the suggestion that was put to her that between 1st of January 2022 to the 31st of December, 2022 at no time in that period did Tarai told her to put Feroz penis into her mouth.

[44] She also disagreed that during that same period at no time Tarai told her to partner Feroz so that he can kiss her breast.

[45] She also disagree with the suggestion that during the same period Tarai at no time told her to go to Feroz so that he can attempt to penetrate her anus with his penis.

[46]She disagree with the suggestion that she was making these stories up because she was angry with her aunty Tarai.

[47] She disagree with the suggestion that she was angry with Tarai as Tarai was spending more time with Ramiza.

[48] She also disagree that she was angry at Tarai because Tarai was growling at her when she was angry with the Ramiza and Tenoa.

[49] She disagree with the suggestion that she wanted to see Tarai punished because of how Tari made her feel when she was at Tari's house in that year.

Re examination

[50] She confirmed that she had opened up to her aunt of what had happened to her and that is why the matter was reported to the police.

[51] The State closes its case.

[52] The Court finds there is a case to answer on all six counts against the two accused persons. Both the accused were given the three options. Accused two opted to give evidence, and will not call any other witness. Accused opted to give evidence with one more witness to call. Matter was adjourned to the 8th of December, 2025 for continuation of Defence case.

Defence Evidence

DW1: Mohammed Feroz Khan

[53] He is the husband of Tarai Harry Bianeke and is the accused no: 1 in this case. He said he knew the complainant Rupetara as she was his wife's niece. In 2022 he said, he was living in Tawatawa settlement from January to April 2022.

[54] He said they owned two houses; his dad and his sisters lived in the first house whilst his wife and himself lived in the second house. He said his house is less than a 100 meters from his house.

[55] He said he often see her come to his place to spend weekends sometimes in 202he said she never comes in 2022. He said RT was staying on the opposite side of the river in Tawatawa. He said when RT visits he was not familiar as he was not around the place where she is.

[56] He said his sister was close to Rupetara. His sister's name is Ramiza. It was suggested to him that between the 1st of January to the 31st of December 2022 at Tawatawa he had penetrated the mouth of RT with his penis. He replied it was a false allegation.

[57] He said she was not coming in 2022 to his place. It was again put to him that penetrated her mouth with his penis inside his bedroom. He replied that it was a lie. He said in 2022 she did not come to my place.

[58] It was again suggested to him that between January 1st to December 31st 2022 at Tawatawa village he had unlawfully and indecently assaulted RT. He said it's a lie because she did not come to my place in 2022.

[59] He said he can remember playing hide and seek with RT his younger sister, Ramiza, Tenoa and his wife in 2021. He said RT and Ramiza asked him to play with them. RT chose him to be his partner and they played for about half an hour than they came back home. He said he was just running around the soil and she was following him.

[60] He said because of the heap of soil they cannot see each other. He said he was guising his wife, his sister and Tenoa. RT was with him for about 15 minutes. He said they did not find RT and himself because they were moving around. The game finished in the evening and it took about 30 to 40 minutes.

[61] It was put to him that RT told the court that during that game of hide and seek Feroz took her into the bush. Feroz replied and said it was straight lie. It was put to him that he lifted up her t- shirt and kissed her stomach breast, neck. He said in the evening he was busy with his friends.

[62] He said he was approached by RT aunties and told him about all this she asked him to pay amount of money to RT and family so that they will withdraw the charge.

[63] The allegation was also put to him that between January 1st and December 31st 2022, he attempted to penetrate the complainant's anus. He replied and said that it was a lie.

Cross Examination

[64] He said his relationship with "RT" in 2021 was cordial meaning respectful and polite. He disagree that "RT" visited his house on one particular day in the year 2022 where his Tarai and his parents s were enjoying a kava session. He knew the mother Akon and the fathers name is Etika.

[65] It was put to him that sometimes in 2022 the "RT" visited his home and at that time the family was having a kava session including Tarai. It was put to him that at that time "RT" and Ramiza were telling stories.

[66] It was suggested to him that on that night Tarai and "RT" left the house to go to the second house. He disagreed with the suggestion.

[67] It was suggested to him on one particular day in the year 2022 "RT" visited your house where you Tarai, and your parents were drinking kava. He disagree with the suggestion. It was suggested to him that on that same evening "RT" was telling stories with Ramiza. It was suggested to him that Tarai and "RT" left the first house whilst his parents and Ramiza were behind. Further suggested that he saw them leave and followed them to the second house. He disagreed with that.

[68] It was further put to him that he entered the second house through the back. He door and went straight into the bedroom and laid on top of the bed. A little while "RT" came into the bedroom and you told her to sit beside you on top of the bed.

[69] It was put to the accused that he grabbed the complainant "RT" pulled her to his bed and told her to suck his penis. It was put to him that he forced her head towards her genital area and he put his penis into the complainant's mouth.

[70] It was suggested to him that "RT" resisted his disgusting behavior which he carried out for about 20 minutes and also when he was doing all these acts to "RT" she was crying. Later you told he told "RT" to leave the bedroom and called Tarai to come inside the bedroom.

[71] Again it was suggested to the first accused that he was climbing coconut on the next day near his house, "RT" asked Tarai that she wants to drink green coconut juice and you told Tarai that anything "RT" wants from them they will provide but in return Accused needs "RT" s body in return.

[72] It was put to the accused that all their planning and discussions was a team effort between the accused one and accused two.

[73] It was again put to Feroz (1st Accused) that on one occasion in 2022 Tarai, Tenoa, and TR were playing in the house. Later it was suggested by Tarai that all of you in a group of four to go outside to play hide and seek. And in the accused 1 presence he heard "RT" telling Tarai that "RT" wants to team up with Tarai but Tarai told "RT" that she was to team up with Accused 1 Mohammed Feroz.

[74] It was put to Accused 1 Feroz that he led "RT" deep into the bush during the hide and seek so that it would be difficult for Tarai and Tarai and Tenoa to locate them. It was put to him that he told RT to remove the Sarong she was hand across her shoulders and handed it over to you.

[75] It was suggested to him that he took the suluvakatoga and spread it on the ground. Thereafter he forceful pushed RT on to the Sulu. He denied the same. You told RT not to make a noise or say anything. You got on top of her and lifted up her T-shirt and her sport bra. He's answered with a "no"

[76] It was then put to her that he then kiss her stomach region , her naked breast and her neck., in doing the same you told "RT" not to move, not to make a noise or resist.. He answered with a "no."

[77] It was then put to him that "RT" successfully pushed him away wore her clothes, sport bra and T-shirt and walk away. He answered "no".

[78] It was suggested to him that Tarai and Tenoa had left for home because they could not find them as they were deep in the bush. He answered "no". It was further suggested to you that yopou and Tarai planned this all along to play hide and seek for the purpose of you sexually assaulting "TR". The answer was "No".

[79] Again, It was suggested to you that through your spousal discussion and planning you instigated that Tarai tell "TR" to satisfy your lustful needs again at night. The answer was "no".

[80] And again because of you spousal discussion that you were having with Tarai then asked "RT" to avail herself again for you at night. He replied and answered "no".

[81] It was suggested to him that during that he was lying on a mattress in the second house on the floor in the living room where a curtain was separating the him from where Tarai and "RT" was standing . The answer was "no".

[82] It was suggested that through your spousal planning with Tarai, she send "RT" to where you were lying down in the living room. The answer was "No". You then made "RT" lay down on the mattress beside you and told her not to make any noise. The answer was "No".

[83] It was suggested to the accused that he told "RT" to turn over with stomach facing the floor and her back facing the accused. You then took off you pants and showed RT your penis and thereafter he tried to insert his penis into her anus. When he was doing all this, he was holding her not to move or free herself from from him. He answered "no"

[84] It was put to the accused that after a few minutes he stopped trying and told the complainant to go from there. Answer was "no". "RT" than left the accused and went back into the bedroom where Tenoa was sleeping and lie beside her.

[85]The accused agreed that he was Tawatawa between January and April 2022 but he denied that he was in Tawatawa village between January 1st to 31st of December 2022. It was put to him that all this allegations did occur between Januarys to April 2022. He answered no.

DW2: Ramiza

[86] She said in 2022 she was living in Tawatawa. She said his brother Mohammed Feroz khan and his wife Tarai Bianeke were in Suva. According to her "RT" was living together with her mother and stepfather in 2022.

[87] She agrees that "RT" visits her at her house but she cannot confirm how many times. She said they would play when "RT" visits her at her house. They would play outside of the house.

[88] She confirms that "RT" at times stay overnight at her house. She said "RT" would sleep at the house where her brother stays. She said "RT" sleeps at her brother's bed. She said that Feroz and Tarai used to sleep in the other bedroom.

[89] She said she is close to "RT". They would speak about school and plan what to do.

Cross Examination

[90] She said she could not remember the evening when “RT” and she were telling stories whilst the accused and his family were drinking grog in the kitchen

DW3: Tarai Bianeke (Accused 2)

[91] She said between January to June 2022 she was residing at Tawatawa. From rest of June to December she moved to Suva. In January 2020 she was residing with her uncle at Banaras.

[92] She agreed that “RT” is her niece. It was put to her that husband parents and herself were all groping at the kitchen when “RT” was telling stories with Ramiza inside the living room.

[93] She said “RT” lied when “RT” said that Tarai told her to go to Mohammed Feroz so that Feroz can insert his penis into her mouth. She answer “no”. According to Tarai “RT” lied when “RT” said that Tarai told her to partner Feroz during the hide and seek game so that Feroz can lick her stomach and her breasts. She answered no.

[94] According to Tarai “RT” gave evidence in court stating that Tarai told her to go to Mohammed Feroz so that he can insert his penis into “RT”’s anus. She denied the same.

Cross Examination Accused 2(Tarai H. Bianeke)

[95] She said in 2022 she was not working and stayed back at home at her father in laws place. According to her it was about 2minutes to walk from Aokan’s house to her father in laws house. Her father in law has two houses the 1st house has a kitchen and a living area, an open kind of house. The second house which has a bedroom and a living room and a normal house.

[96] She agreed that “RT”’s coming to her father in laws house was because of Ramiza as they are of similar age.

[97] It was put to her that according to “RT” the first incident happened when the witness took ‘RT” down to the second house continued to ask her the same question “can you do it” she even told RT to get the bible from the room and swear on the bible that she will not tell anyone what is about to happen that night. She than told “RT” to go into the bedroom where Feroz was in after entering from the back door.

[98] It was put to her that she told “RT” to satisfy her husband’s lustful needs that night. She answered “no”.

[99] It was put to that she aided and abetted in other words assisted and supported her husband lustful behavior of penetrating RT’s mouth with his penis. She answered she didn’t.

[100] Tarai had agreed that she had stayed in Tawatawa village from January 2022 till June 2022 then she moved to her husband in Suva. Tarai agreed that she had no grudges or animosity with her relationship with "RT".

[101] Tarai went further to say that she had a limited relationship with RT because she wanted to avoid the headache RT would give her if she took RT home. She agreed that she still love her husband Mohammed Feroz.

[102] It was suggested to her that she would entertain any request her husband has made to her. She answered "no". It was suggested to her that it was her decision together with the encouragement of her husband Feroz to lure "RT" to satisfy her husband's lustful behavior.

[103] The hide and seek incident was also put to her where it was suggested that she told "RT" to partner with Feroz so that Feroz can sexually abuse her in the abuse. She answered no. IT was put to her that later "RT" came to her and confronted her what her on what had done to her in the bush. She answered "no"

[104] Following the incident in the bush it was suggested to Tarai that she told "RT" "Can you do it again tonight" It was clear that she had aided "RT" to satisfy her husband's lustful desires.

[105] It was put to Tarai when she aided "RT" she had intended "RT" sleeps with her husband evening. And on the same night at the second house you told "RT" to come out of the bedroom and to go to your husband who was lying on a mattress on the floor. She answered "no".

[106] It was put to her that it was her plan all along for her husband Feroz to sexually abuse, assault or rape "RT". She answered saying "no".

[107] Tarai agreed that it is unreasonable for an 11year old child to hold a grudge against a 19 year old woman from June 2021 to 2022.

[108] It was put to her that in her evidence the day before and her evidence now she maintained that "RT"'s evidence was not true. She answered yes.

[109] It was suggested to Tarai that "RT" did not only testify to one sexual transaction of which she alleged Tarai had aided and abetted. She testified to three (03) three transaction.

[110] It was put to Tarai that the reason why she is denying these allegations was because she was trying to save herself.

Re examination

None.

Analysis

[111] In this case the prosecution, totally rely on the evidence of “RT” the child complainant who gave evidence on behalf of the prosecution. For the defence, Accused one Mohammed Feroz Khan had called another witness to testify in support of his case. As for the second Accused Tarai Harry Bianeke, she gave evidence to support her case.

[112] The burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove all the elements of the charge beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove at paragraph 10 of this judgment.

[113] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.

[114] Based on the said admitted facts it is admitted that the accused 2 Tarai Harry Bianeke and the complainant are related to each.

[115] It is an admitted fact that accused two is the complainant’s maternal Aunt and secondly, Tarai Harry Bianeke and the complainant’s mother are cousin sisters.

[116] The birth certificate of the complainant is tendered in by consent as part of an agreed fact. The complainant’s date of birth was 05.10.2011.

[117] The primary issue to be determined in this case is the credibility and reliability of the evidence of the complainant “RT”, and the evidence of the first and second accused.

[118] The complainant in her evidence clearly outlined how the first accused committed the offences of Rape, Sexual Assault and Attempted Rape and how the second accused committed the offences of aiding and abetting the 1st accused in committing those offences against the complainant.

[119] I have summarized the evidence of all witnesses led during the trial.

[120] Complainant had confirmed in her evidence that sometimes between the 1st of January 2022 and the 31st of December 2022 the second accused had send her to the first accused who was lying in bed in the bedroom waiting for her. The first accused grabbed the complainant and then inserted his penis into her mouth. The complainant said that the 1st accused did it for about 20 minutes. The second accused had assisted and encourage the 1st accused in committing the sexual offence by convincing the complainant to go to the first accused in the bedroom and do what the accused want

[121] Again the Complainant has presented evidence that sometimes between 1st of January 20-22 and the 31st of December 2022 the first accused whilst teaming up with the complainant playing the hide and seek game in the bush had sexually assaulted the complainant by removing her clothes and kissing her stomach and her breasts and laying her down on her sarong which was spread on the ground inside the bush. Prior to this incident the second accused had intentionally arranged that the complainant to partner the first accused in the hide and seek game which they played in the bush so that the first accused is able to commit these sexual offences against her. The complainant had informed the second accused that the first accused sexually assaulted her inside the bush but the second accused told the complainant that she should do it again to the first accused that evening.

[122] The complainant had presented evidence that later in that evening she heard the second and first accused having a conversation in the sitting room and soon after that the second accused called her and she told "RT" that she needs to go to the first accused who is behind the curtain. Further in her evidence she said that the second accused hold the "RT" and led her to Feroz who was behind the curtain. She said that the first accused turned her over removed her clothes and his clothes with her back facing Feroz and with his hand holding "RT" not to move Feroz tried to insert his penis into the "RT's" anus. "RT" said that the first accused was holding her back. After that she stood up and wore her pants and pantie and the first accused told her to call the second accused to him.

[123] It was clear from the evidence that the first and second accused who are husband and wife had carefully planned the three incidents that involved the 1st accused and the complainant. It was clear that the complainant was manipulated by the accused 2 to satisfy the lustful desires of the first accused.

[124] The accused 1 and Accused 2 both totally deny all the allegations made against them by the complainant. The defence position is that during the period of the alleged offending, which is between 1st of January 2022 to the 31st of December they were both in Kalabu Suva from April and June, 2022 onwards.

[125] Accused one Mohammed Feroz Khan also takes up the position that he fully denied any wrongdoing in all the three counts against him. He pushed forward a rhetoric that the complainant did not come to their residence in 2022 and in April 2022 he had no longer stayed in Tawatawa village but was residing in Nasinu, Suva at that time. Most of the responses by accused one towards the allegations was that the complainant was telling a lie.

[125] The second accused takes up the position that the complainant was jealous that the second accused was more inclined to and favoring her sister in law namely Ramiza and that was reason she made these serious allegations against her. Further both accused had advanced that the complainant was telling merely lies against them.

[126] During the course of the trial the accused took up position that from April 2022 to December 2022 he was not living in Tawatawa but was residing in Nasinu Suva. Therefore the allegations made by the complainant “RT” are all lies as she stated that all these three incidents did happened in 2022 in Tawatawa village. However, the proposition that the 1st accused was no longer living in Tawatawa, Lautoka was not put to the complainant during cross examination by his counsel for accused but was living in Nasinu.

[127] Secondly, these seem to fall with the scope of Alibi, however, there no notice of alibi has been given by the defence in terms of the provisions of Section 125 of the Criminal Procedure Act.

[128] Section 125 (1) and (2) of the Criminal Procedure Act is reproduced below:

(1) On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

(2) A notice under this section shall be given —

(a) Within 21 days of an order being made for transfer of the matter to the High Court (if such an order is made); or

(b) in writing to the prosecution, complainant and the court at least 21 days before the date set for the trial of the matter, in any other case.

[129] This case against the accused was filed in the High Court as far back as the 14th of June 2023 matter was taken up for trial almost 2 years and six months later. At no time during this period did the accused notify Court that he is taking up the defence of alibi.

[130] Therefore, Court cannot accept his alibi evidence as true and cannot give any weight to such evidence.

[131] Furthermore, it must also be borne in mind that the complainant in this case is not merely complaining of an isolated incident or a single act. Here the complainant has testified to a sequence of events or a series of acts which both the accused perpetrated on her, on three separate occasions, between the 1st of January 2022 and the 31st of December 2022. Therefore, it is the opinion of this Court that it is highly unlikely for the complainant, who was merely 11 years old at the time, to make up or manufacture such a sequence of events against the accused, unless the incident really took place.

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

[133] As stated previously, the complainant in this case has clearly testified to the manner in which the accused had penetrated her mouth with his penis kissed her breast and her stomach and attempted to penetrate the anus of the complainant with his penis inside his house at Tawatawa village. Although only 14 years of age at the time of her testimony, the complainant withstood the rigorous cross examination by the defence and remained consistent throughout her evidence. It is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable

[134] The Defence attempted to impeach the complainant's credibility during her cross examination by stating that the complainant did not complain of the incidents immediately as it happened. I agree that the complainant only reported the matter to her aunty on 23rd of January 2023 and only thereafter was the matter reported to the Police.

[135] However, this Court is conscious of the fact that children do not always react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavior standard taught or learned.

[136] The complainant has clearly testified to the reasons for the late reporting and not reporting the matter to anyone earlier. The witness testified that she did not tell her biological mother because she has lost trust and faith on her mother for failing to report the incident that happened between her step father and the complainant. Moreover, she did not inform anyone else apart from Tarai because she was scared and afraid of the accused who had told her not to inform anyone about the incidents. I am satisfied with the complainant's explanation for the delay in reporting the matter.

[137] The defence also attempted to impeach the complainant's credibility by highlighting that the complainant "RT" was overwhelmed with jealousy over the second accused sister in law (Ramiza) whom her aunt the second accused favored her when she bought gifts for Ramiza and was always siding with her in their conversations. I find that these attempt by the defence to diminish the credibility and reliability of the complaints has no merits.

[138] I have heard the evidence of the complainant "RT" as well as the evidence of the two accuse d' Mohammed Feroz Khan (Accused 1) and Tarai Harry Bianeke (Accused 2). I believe and accept the evidence of "RT" the complainant that Accused 1 Mohammed Feroz khan had forcefully inserted his penis into "RT"'s Mouth lasting about 20 minutes. "RT" was credible and reliable she stood firm when she was tested in cross examination.

[139] I also accept the evidence of "RT" that the accused Mohammed Feroz Khan had sexually assaulted her by kissing her breasts and her stomach. I accept "RT"'s evidence that the accused attempted to insert his penis into her anus.

[140] I refuse to accept the two accused denial that there” was telling lies about the allegations. The evidence of accused one and two were not credible and unreliable.

[141] Therefore, having analyzed all the evidence in its totality, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charge of Rape , Sexual Assault and Attempted raped .

[142] In the circumstances, I find the Mohammed Feroz Khan (Accused 1) guilty of the following;

1st Count – Rape
3rd Count-Sexual Assault
5th Count – Attempted Rape

[143] Moreover, I find Accused 2 guilty of the following
2nd Count- Aiding and Abetting Rape
4th Count – Aiding and Abetting Sexual Assault
6th count – Aiding and Abetting Attempted Rape

Accordingly, I convict both accused persons on the above.


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Sekonaia.V.Vodokisolomone
Acting Puisne Judge



Solicitors for the State: Office of the Director of Public Prosecutions, Lautoka.
Solicitors for the Accused: Office of the Legal Aid Commission
