

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 016 OF 2025

STATE

V

ISOA BOSEYACO VUNIWAI

Counsel: Ms E. Cabemaiwai for the State
Ms A. Chand with Mr P. Naidu

Dates of Hearing: 12, 13 March 2026
Date of Closing Submissions: 19 March 2026
Date of Judgment: 24 March 2026

(The name of the Complainant is suppressed. She is referred to as MD)

JUDGMENT

(Rape- child complainant aged between 16-18-consent-capacity to consent- Rule in Browne v Dunn)

1. The Accused is charged with one count of Rape contrary to Section 207(1) and (2) (a) of the Crimes Act 2009. The information reads as follows:

Statement of Offence

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

Particulars of Offence

ISOA BOSEYACO VUNIWAI sometimes between the 1st of June 2024 and 30th day of September, 2024, at Sigatoka, in the Western Division, had carnal knowledge of MD, without her consent.

2. The Accused pleaded not guilty to the charge. At the ensuing trial, the prosecution presented the evidence of the Complainant and one other witness and closed its case. The Accused was put to his defence when the Court found that he had a case to answer. Only the Accused presented evidence for the Defence. At the end, the counsel from both sides tendered written closing submissions. Having carefully considered the evidence presented at the trial and the submissions made by the counsel, I now proceed to pronounce my judgment as follows.
3. The Prosecution bears the burden to prove all the elements of the offence. That burden must be discharged beyond a reasonable doubt. The burden of proof never shifts to the Defence at any stage of the trial. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond a reasonable doubt. The accused is under no obligation to prove his innocence or prove anything at all.
4. Section 207(2)(a) of the Crimes Act defines the offence of Rape as follows: a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent. In the context of this case, 'carnal knowledge' could be defined as an act of penetration of the vagina of the complainant with the penis of the accused. A slight penetration is sufficient to prove the element of penetration.
5. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. A consent obtained by force, threat or intimidation, etc., will not be considered as consent freely and voluntarily given. To establish the fourth element of Rape, the Prosecution must prove that the accused knew or believed that the complainant was not consenting or that he was reckless as to whether the complainant was consenting or not.
6. I shall now summarise the salient parts of the evidence led in this trial.

Evidence for Prosecution

PW1-MD (The Complainant)

7. MD is not married. She is unaware of her age. She has one child, Sala, whose father, she said, is Isoa, the Accused. Following her father's death, MD resided with her siblings, Voate and Kina, at her uncle's residence in Navola.
8. MD said she came to Court to tell what Isoa did to her. She and Isoa worked at Beach House, located in Navola, somewhere in the forest, far away from the village. They trimmed the flowers in the garden. She could not recall how long she had worked at the Beach House.
9. One day, Isoa pulled her to a room at the Beach House and took off her clothes. He made her lie down on the floor, and then he lay on top of her. He then pulled out his penis and inserted it into her vagina. She was struggling with pain. She did not scream as there were no other people around them at that moment. She then said Isoa closed her mouth when she screamed. Tako and Saro also worked with her at the Beach House, but they were in front. At no time did she give consent for him to have sex with her.
10. Most of the time, after work, Isoa would force her and drag her inside the room. She told Vuga to advise Isoa to stop what he was doing, but Isoa did not stop. She told Isoa to stop a couple of times, but he kept on doing it. She told Isoa to stop because Sai, Isoa's wife, was there. She came to report in the village, and the gang there spoke with Isoa.
11. Her auntie Iliseva told her to go and see the nurses in Korolevu. She came to know that she was pregnant when the nurses told her. When the nurses questioned, she told them that Isoa made her pregnant.
12. Under cross-examination, MD agreed that she had attended primary school in Bukuya. She does not have a phone but does have a Facebook account. She agreed that she was working with Isoa at the Beach Club from June to November 2024. Her house and workplace were located within walking distance. Isoa's house is three to four meters away from her house. She used to walk to the Beach House with Isoa, and she worked

with him almost every day. In her day-to-day conduct, Isoa was friendly with her; sometimes, though, she wanted to avoid him. She admitted to having shared personal matters with Isoa and showing him the scars resulting from her stepfather's assaults.

13. Apart from the Beach House, she would work with Isoa at Maui Bay as well. She admitted having sex with Isoa often near a big bamboo tree at Maui Bay. She also admitted having sex at the 'Project', which is the storeroom at the Beach House. She admitted having sexual intercourse in the little forest at the Beach House. He would push her down forcefully and start hitting her vagina with his penis. She did not give consent to Isoa to have sexual intercourse with her.
14. She stopped coming to work because she had stomach pains. She was afraid to tell the villagers who the father of the baby was because Isoa had threatened her that if she did tell anybody, he would kill her. She was afraid of Voate and Sanaila, the *Turaga-ni-Koro*. If Voate knew of the relationship, he would be angry with her. She was ashamed of the relationship with Isoa. Whenever she refused to give consent, Isoa would force her to have sexual intercourse with him.
15. Before going to the doctor, she told Auntie Iliseva who the baby's father is. She did not tell Iliseva that Isoa was with her. She rather told Iliseva that Isoa made her pregnant. On 10 December 2024, the doctor, after an examination, found out that she was five months pregnant.
16. She denied the proposition that she had never told anyone that Isoa had forced her until it was discovered that she was pregnant. She told the gang at home, Auntie Su, Uncle Vereji, and Josie. They did not do anything because they knew that she was pregnant. She admitted that she hid her pregnancy because she feared the village people. She denied fabricating the allegation to save her image in the village.
17. Aunty Iliseva and Sana (Village Headman) took her to the hospital. Before they took her to the police station, Voate punched Isoa. After the punch, the villagers forced her to give a statement to the police.

18. Upon re-examination, MD denied consenting to sexual intercourse at any point. Whenever she said 'No,' Isoa would force her. He would push her down forcefully, sometimes drag her, seize her hand by force, and make her lie on the ground against her will. She admitted to giving consent to Isoa for sexual intercourse only once between June and November.

PW2 Iliseva Tuvou

19. Iliseva has been living in Navola Village for 18 years. She is a village nurse. When the outreach doctors' team visited the village on 10 December 2024, she assisted them in conducting medical tests. When the doctors told her to take MD to the hospital, she accompanied MD. The doctors had tested MD's urine and discovered she was pregnant. On her way to the hospital, MD did not tell her anything. After the check-up at the hospital, MD told her she was pregnant, but initially did not reveal who the father of the baby was. Upon being questioned, MD said that Isoa Boseyaco is the father.
20. Under cross-examination, Iliseva agreed that, at no point in time, MD said that she was forced to have sex or that she was raped.
21. Under re-examination, Iliseva said that MD first lied and said before the urine test that she was not pregnant. MD didn't know that she was pregnant. After the test, when MD became aware that she was pregnant, she cried.

Evidence for Defence

DW1- Isoa Boseyaco Vuniwai (61) (The Accused)

22. In 2024, Isoa was working at Beach House Resort as a caretaker and landscaper. Four people worked in his department, including MD. MD started the job in March or April 2024 and left around November 2024. She stopped attending work on her own. Sometimes he would go to work with MD, who was his neighbour.
23. MD was normal and had attended school. He is not closely related to MD. They were friendly at work. While working together, he had a sexual relationship with MD

numerous times at their workplace. He was not sure if he was permitted to have sex at the workplace. When asked by the court if he was married, he said 'no'. He then admitted that he was in a de facto relationship and that he has one child. When he approached MD for sex, she would give her consent to engage in sexual intercourse.

24. From June to November, they had sexual encounters numerous times in the forest, at the nursery, at 'Mokusiga', and near the bamboo tree at Maui Bay, where they sometimes went to work. She never refused sex and would rather initiate it.
25. He realised that MD was pregnant when he saw her stomach enlarge. When he asked her whether she was pregnant, she replied that she was not. Her pregnancy was confirmed when she was taken to the hospital. It was then that MD accused him of rape for the first time. MD's brother punched him. The villagers also threw stones at his house. Sanaila, the village headman, approached him and sat down for a conversation. He offered to take care of the baby. Sanaila conveyed his offer to MD's relatives, but they were adamant about taking the matter to the police.
26. He said he never coerced MD into having sexual intercourse with him. He denied threatening, restraining, or covering her mouth. They were working together at the same place throughout. MD discussed personal matters and even shared jokes with him. She also talked about her stepfather and how he often hit her.
27. Under cross-examination, Isoa stated that MD is her niece on her wife's side. He denied that, as her uncle, he had authority over MD. Because she trusted him, she confided in him about the issues she faced with her stepfather. He denied taking advantage of the trust she had in him.
28. Under re-examination, Isoa admitted to having had sexual intercourse just once with MD even after she said 'no'.

Evaluation/ Analysis

29. Although not recorded as an admitted fact, it is undisputed at the trial that the Accused had sexual intercourse with the Complainant between 1 June 2024 and 30 September

2024. The Accused, in his evidence, admitted that he had had carnal knowledge of the Complainant not once but on numerous occasions during the said period and till November 2024. The Defence Counsel informed the Court at the outset that the Accused's defence is consent.

30. In the information, no specific date of offending is identified between 1 June 2024 and 30 September 2024. However, it is not based on a representative count¹. What the Prosecution is required to prove is whether the Accused, at least on one occasion during the said period, had sexual intercourse with the Complainant without her consent and whether the Accused knew/ believed or was reckless as to whether the Complainant was consenting or not.
31. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. Courts determine if a complainant had the mental capacity to consent to sexual acts by assessing if she/he understood the nature of the act, the identity of the partner, and had the freedom to choose, often examining evidence of cognitive impairment, coercion, or fear. Consent must be voluntary, and a lack of capacity means the person could not make an informed choice².
32. There is no requirement to prove an absence of consent in a rape case if the complainant is under the age of 13 years because the law deems that the complainant does not have the mental capacity to give consent³. In some jurisdictions⁴, there is no requirement to prove an absence of consent for rape involving children under 18 having sexual relations with persons in a position of trust; or children under 18 involved in sexual activity with family members over 18⁵.
33. In Fiji, if the child is above 16, the determination of consent is a matter for the courts. For a court to determine that a complainant consented to sexual activity, it must first be

¹ The Defence Counsel's closing submission was based on a representative count.

² State v Sova [2016] FJHC 443 (23 May 2016)

³ Section 207(3) of the Crimes Act

⁴ In the UK

⁵ Sexual Offences Act 2003 (UK) Chapter 6 [<https://www.cps.gov.uk/prosecution-guidance/rape-and-sexual-offences-chapter-6>]

satisfied that the person had the mental capacity to give that consent. Whether a child⁶ over 16 lacks the mental capacity to consent is a question of fact for the court, focusing on her/his understanding of the sexual activity. Relevant factors in this assessment may include the child's age (under 18), the existence of a trust-based relationship, familial involvement, and the child's ability to understand the consequences.

34. It is admitted that the Complainant in this case was 16 years old at the time of the alleged offence. The first impression of her made me question myself whether she was a typical child without cognitive impairment. Based on her appearance and what I gathered from the Prosecution's uncontested pre-trial applications⁷, I inquired from the State Counsel whether the Prosecution would take a position that the Complainant did not have the necessary mental capacity to give consent to the alleged sexual act.
35. To my astonishment, the State Counsel answered in the negative despite her pretrial applications for special measures reserved for vulnerable witnesses. By the time the pre-trial issues were settled, the Complainant had become an adult. It can be assumed that the Defence did not object to those applications because they acknowledged that the Complainant is a vulnerable witness although by then she was an adult.
36. I doubt the Complainant received adequate assistance from the State to engage effectively with the legal system⁸. Prosecution's stated position, however, does not prevent the Court, in the best interests of the child and those of justice, from making its own assessment on the Complainant's intellectual capacity to give consent to a sexual activity⁹. When capacity is in doubt, the Court must balance the protection of the vulnerable with the rights of the accused, often leading to a "person-specific" assessment

⁶ In Fiji, a child is defined as a person below 18 years of age. While the 2013 Constitution sets the 18-year standard for child rights in the Bill of Rights (Section 41), some specific domestic legislations like the Juveniles Act 1979 still retain a definition of under 17 years, creating a discrepancy.

⁷ At PTC, the Prosecution made applications for special protective measures reserved for vulnerable witnesses such as a closed court and a support person. The Defence did not object to those applications. When the counsel signed the pre-trial checklist dated 27.02.2026, when the Complainant was already an adult. It can be assumed that the Defence did not object because it acknowledged that the Complainant is an adult vulnerable witness.

⁸ Adequate state assistance helps vulnerable witnesses navigate the system, allowing the court to independently evaluate evidence. Complainants with mental disabilities or vulnerabilities require "all practicable steps" to be assisted by the State to participate in the legal process. Failure to provide such support can constitute a denial of access to justice.

⁹ Section 41(2) of the Constitution dictates that the best interests of a child are the primary considerations in every matter concerning a child.

of whether the complainant was capable of consenting in the specific context of the alleged incident.

37. Two questions need to be answered: (a) whether the Complainant had the capacity—namely, age and understanding—to decide whether or not to participate in the sexual activity at the relevant time; (b) whether she was in a position to make that decision freely and was not constrained in any way.
38. The Complainant’s demeanour and her evidence shed some light on these issues and her cognitive capacity, which would lend support to my initial impression of her. She stated she is unaware of her age¹⁰. She could not remember how long she had worked at the Beach House. She stopped working because she had stomach pains, and she confirmed she was pregnant only when the nurses informed her after a pregnancy test. By then, she was already five months pregnant.
39. The Complainant showed possible cognitive limitations, as evidenced by her inability to recall her age, length of employment and her unawareness of a five-month pregnancy until it was medically confirmed. These behavioural signs (demeanour/evidence) suggest a possible lack of maturity or understanding, raising questions about her capacity to make informed decisions on sexual matters. She struggled to understand some questions, even after two interpreters of different dialects attempted to assist. Unlike standard practice, the police had not recorded her previous statement in narrative form. All these factors indicate that the issues were not merely dialectical but possibly linked to high cognitive load, trauma, or, in some cases, potential intellectual or psychological barriers.
40. Under cross-examination, the Complainant surprisingly tended to sail with the Defence Counsel, agreeing with some of their propositions which were diametrically inconsistent with her own evidence. The Defence Counsel even managed to make her agree to the proposition that she was having consensual sexual intercourse with the Accused almost every day.

Q: May I say, I put to you that you had consensual sexual intercourse with Isoa every day.

¹⁰ It is admitted that she was 16 at the time of the offence

A: Yes, my Lord.

41. Having admitted to engaging in sexual intercourse with the Accused in places suggested by the Defence Counsel, the Complainant maintained that those encounters were non-consensual. Suddenly, she changed her position and agreed that she consented to one such advance, but she was non-specific as to the time and the place.
42. When a complainant in a criminal trial agrees with defence counsel's propositions during cross-examination, particularly when those propositions are inconsistent with her/his own evidence-in-chief, it significantly impacts the credibility of her/his testimony.
43. However, the Complainant's inconsistent or problematic behaviour, in my view, was caused by genuine cognitive limitations rather than intentional lies. The use of improper leading questions exacerbated the situation, causing judicial concern over the fairness of the examination. By compelling a Complainant to agree that sexual intercourse was frequent and consensual, the Defence aimed to align with a common "rape myth" that consensual sex is an all-or-nothing proposition, rather than being specific to a particular time and place¹¹.
44. Although the Complainant attended school and had a Facebook account, and considering her age (16) and her relationship with the Accused, who is her uncle in his late fifties¹², I am unable to accept that the Complainant had the necessary cognitive capacity to consent to sexual activities freely.
45. Bearing the said assessment in mind, I proceed to analyse the arguments advanced by the Defence to challenge the credibility of the Complainant and the reliability of her evidence.
46. The Defence, having claimed that, by the end of the trial, the evidence had expanded far beyond the charge period and far beyond any single identified incident, argues that the

¹¹ This myth, often termed the "all-or-nothing" or "continuing consent" myth, wrongly assumes that once consent is given, it applies to all future acts or that consenting to one activity implies consent to all others. True consent is specific to a particular time, place, and act, and can be withdrawn at any time.

¹² In the agreed facts, it is admitted that the Accused was 59 years old.

Prosecution did not isolate any single act within that period and prove that specific act as non-consensual.

47. It is true that the Complainant, under cross-examination, admitted numerous specific occasions where sexual intercourse took place with the Accused. However, in her examination-in-chief, she stated, albeit not in detail, that most of the time, after work, the Accused would force her, drag her inside the room and keep on doing 'it'. Therefore, it is not correct and fair to say the Complainant, having suppressed those incidents in her examination-in-chief, divulged only upon being confronted in cross-examination. No doubt, the detailed specifics of numerous sexual encounters, not voluntarily divulged by the Complainant in her initial testimony, had been provided by the Accused to his counsel for cross-examination.
48. The Prosecution must prove the charge as framed. The information was based not on a representative count but on a single act of sexual intercourse that allegedly occurred within a certain period (between June and September 2024).
49. The Complainant's failure to provide full details of multiple sexual encounters during direct examination, only admitting them under cross-examination after being prompted by Defence, does not mean the evidence is unreliable or suppressed, particularly when the Prosecution's case centres on a specific, forced act of sexual assault.
50. The Complainant's focus in examination-in-chief (EIC) was on a specific sexual act that occurred at Beach House, where she struggled in pain after being forcefully dragged into a room. She maintained it occurred without her consent. The Prosecution met its burden by identifying and proving a specific, non-consensual act of sexual assault within the June–September timeframe.
51. The expansion of the time frame up to November 2024 was done by the Defence when it succeeded in getting the answer it wanted by putting a leading question to the Complainant. In her EIC, the Complainant clearly said that she could not recall how long she had worked at the Beach House. If that is the case, she could not have recalled that she worked till November. She only knew she stopped coming to work when she got a stomachache.

52. The Defence claims that the Complainant was inconsistent as to her knowledge *vis-à-vis* the Accused. There was no dispute that the Accused was the Complainant's child's father, her uncle, her neighbour and the workmate at the Beach House. Let me reproduce the relevant parts of her evidence:

Q: Thank you, MD. Now, can you tell this girl the name of Sala's father?

A: Isoa, my Lord.

Q: Now, Ms. MD, who is this Isoa that you have mentioned?

A: Yes.

Q: Do you know who this Isoa is? Who is this Isoa?

A: Yes, my Lord. I am aware of who this Isoa is.

Q: How do you know Isoa?

A: I saw him, my Lord.

Q: Where did you see him?

A: He is sitting at the back, my Lord.

53. The Complainant initially said she could not remember the year 2024. However, she then gave a narrative of events alleged to have occurred during that period. The Defence claims that, because of this inconsistency, the Complainant should not be believed.
54. Due to cognitive limitations, the Complainant may not have been oriented to time and date. However, she clearly recalls the incidents and was able to put her experiences into evidence. She signifies a documented phenomenon where a victim can experience trauma-related memory issues¹³. While the Complainant may struggle with chronological and semantic memory (dates/years), she may retain vivid, accurate episodic memories of the specific, traumatic incident itself. That infirmity would not make the Complainant a liar. Let me reproduce the relevant parts of her evidence:

Now, MD, I will take you to the year 2024. Do you recall that year?

A: No, my Lord.

Q: Now, MD, can you recall what you are here to tell the court?

A: Yes, my Lord. I am aware.

Q: And can you tell this court what exactly you are here to tell the court?

A: My Lord, for me to tell what happened, for me to tell a story, my Lord.

¹³ Hippocampus Inhibition: During intense stress or trauma, the hippocampus—the brain region responsible for organising memories in chronological order—can be suppressed.

Q: And what story are you here to tell the court?

A: I am here to tell a story, my Lord, of what he did to me.

.....

55. The next credibility challenge concerns the apparent inconsistency in Complainant's evidence that describes how she reacted to the alleged sexual assault.

Q: Now, when you said you were struggling with pain, did you at any time scream for help?

A: My Lord, it was just the two of us, and there were no other people within, that was around us at that moment.

Judge: Can you describe the place where this incident took place?

A: So I did not scream, my Lord.

56. Shortly afterwards, when the Court asked if she screamed, she said she did, and she added that the Accused covered her mouth.
57. Victims of sexual assault react in diverse ways—including screaming, freezing, or attempting to appease the attacker—and there is no single "typical" response to rape. Legal understanding now recognises that trauma can cause a wide range of reactions, and a lack of physical resistance or screaming does not imply consent, especially in a case like this where there is a huge age gap and power disparity between the participants. Therefore, the inconsistency highlighted by the Defence is not material when it comes to the question of whether the Complainant consented.
58. The Defence advanced a proposition that the Complainant knowingly concealed the pregnancy until medical discovery, because of fears of stigma and social shame. Having admitted that she hid her pregnancy because she feared the village people and her brother, she denied fabricating the allegation to save her image in the village.
59. The Complainant had never told anyone that the Accused had forced her until it was discovered that she was pregnant. She gave explanations for this conduct. She feared the Accused, who had threatened to kill her if she divulged the father of the child. She feared the villagers and her brother Voate. She was also concerned about her image before the Village Headman.

60. There is no "typical" response to rape; victims react in diverse ways ranging from immediate disclosure to long-term silence, shock, or denial. Reactions are driven by trauma, fear of stigma, self-blame, or lack of safety, with many survivors struggling to process or report the incident, often due to experiencing trauma-induced memory gaps or shame.
61. The Complainant admitted that the villagers forced her to lodge a report with the police. When it was revealed that the Complainant had been impregnated, the whole village, including the Village Headman, was involved despite it being purely a private matter. The Accused's house was stoned. The villagers would not have believed, being aware of the Complainant's condition, that she must have had a consensual sexual relationship with the Accused, who was her elderly uncle¹⁴. It is significant that her brother, Voate, punched the Accused, his uncle, not her sister, the Complainant. I am convinced that the complaint eventually made to the police is genuine.
62. Although at one point, answering a leading question, the Complainant admitted she hid her pregnancy because she feared the village people, she had maintained that her pregnancy was confirmed after the medical discovery. Even the Accused admitted that the Complainant's pregnancy was confirmed when she was taken to the hospital. The Accused, noticing the Complainant's belly, had asked her whether she was pregnant, and she had replied that she was not.
63. It appears that the Complainant's mother had sent the Complainant to the hospital when a suspicion arose that she was pregnant.

Judge: So why did your mother tell you to go to the hospital?

A: Because she knew that I was pregnant, my Lord.

Judge: How did she know?

A: As soon as she just saw me, she started to know from there that I was pregnant.

64. Despite her mother's suspicion, it appears that the Complainant was ignorant that she was pregnant. Iliseva's evidence supports this proposition. On her way to the hospital,

¹⁴ In sexual assault cases involving a complainant with a specific, vulnerable, or impaired condition, and a trusted relative like an uncle, a legal consensus exists that a reasonable person would not believe the acts were consensual. Such cases often focus on the power imbalance and the inability to consent, rather than an implied or "expected" consent.

the Complainant did not tell anything to that effect. It was after the check-up at the hospital that the Complainant revealed that she was pregnant. Iliseva first thought the Complainant was lying, but she later confirmed that the Complainant didn't know that she was pregnant. The Complainant started crying when she became aware of her pregnancy, and upon being questioned, the Complainant revealed that the Accused impregnated her.

65. I agree with the Defence proposition that Iliseva would not have known why the Complainant cried. But it is a fact that the Complainant cried simultaneously when she learned about her pregnancy. That was what Iliseva observed.
66. According to the Complainant, this was not the first complaint that implicated the Accused. She had complained about the Accused's improper advances to her workmates at Beach House, one of them was Vuga. Vuga had even confronted the Accused on those allegations. However, Vuga was not called as a witness. Therefore, the Court is unable to confirm the veracity of Complainant's evidence on the recent complaint. The Prosecution's failure to call Vuga, however, is not fatal, as no corroboration is required to prove a sexual charge in Fiji.
67. The Defence argues that if the Complainant was genuinely prevented from reporting due to fear of being killed, it is difficult to reconcile that with her own evidence that she, in fact, disclosed the matter to Vuga and that Vuga confronted the Accused.
68. The Complainant's evidence is that she was afraid to tell the villagers who the father of the baby was because the Accused had threatened her that if she did tell anybody, he would kill her. The Accused's death threat would have come much later, only when it was known that the Complainant was pregnant and after she had complained to Vuga and other workmates.
69. Vuga was a workmate of both the Complainant and the Accused at Beach House. He would not have pursued the complaint any further, leading the Complainant to realise the futility of reporting. That would explain the unhindered repeated sexual acts and why the Complainant waited until 10 December 2024 to make a formal complaint. She could not hide it anymore because she was five months pregnant. However, it would not be

considered a recent complaint, not only because it was late but also because it was not spontaneous- the revelation occurred only after Iliseva questioned her. However, lack of recent complaint is not fatal to the Prosecution's case, given the reasonable explanations for the delay.

70. In re-examination, the learned Prosecutor asked the Complainant whether, at any time when she had sexual intercourse with the Accused at the "Project", she had given consent. In response, the Complainant stated, "because of the guests inside the project". The Defence argues that her explanation is inconsistent with her evidence that the incidents of sexual intercourse occurred in isolation, where she could not seek assistance.
71. Describing the incident at the Beach House, the Complainant said that she screamed, and that the Accused covered her mouth. Later, she had received a death threat from the Accused. Under these circumstances, she is justified in her explanation and not inconsistent with her stance that the sexual intercourse was nonconsensual. It appears that the Complainant was submitting herself to the Accused without protest because she knew there were some guests at the "Project". The submission without resistance shall not alone constitute consent. A consent obtained by force, threat or intimidation, etc., will not be considered as consent freely and voluntarily given.
72. Let me now analyse the evidence for the Defence. The Accused, having admitted to the sexual intercourse at the Beach House, described how he repeatedly had sex with the Complainant at various places from June to November 2024. He maintained that the sexual relationship was consensual.
73. By noticing the Complainant's belly, the Accused realised that the Complainant was pregnant. Nevertheless, he admitted to having sexual intercourse continually till November 2024. If the Complainant was five months pregnant as at 10 December 2024, he would have had repeated sex even after she conceived somewhere in July, which is hard to believe.
74. He accepted the paternity and offered to take care of the baby of the Complainant's child only after her brother punched him, and the village headman intervened. His offer, which appeared to be aimed at reconciling at the village level, was futile because her relatives

were adamant about taking the matter to the police. The accused's conduct suggests that he was guilty of making her underage, intellectually challenged niece pregnant.

75. The Accused was not straightforward. He was reluctant to say that he is married. When the Court questioned, he then admitted he is in a *de facto* relationship with a child. In his EIC, he said he was not closely related to the Complainant. Under cross-examination, he admitted that she is her niece on her wife's side.
76. Being her elderly uncle, neighbour, and workmate, the Accused built a trust with the Complainant to an extent where she shared personal matters (that her stepfather hit her) with him. I am sure the Accused used his authority and betrayed the trust by taking advantage of the situation.
77. Most significant is the Accused's admission that he proceeded to have sexual intercourse on one occasion even when the Complainant said "no". The admission—especially when made during re-examination—is legally devastating to the Defence case. In sexual cases, the core of the offence is the absence of consent. A voluntary admission by the Accused that he continued intercourse after the complainant explicitly said "no" directly contradicts a defence of consent, essentially admitting to the act of rape. Let me reproduce the relevant parts of his evidence:

Q: Mr Isoa, when you had sexual intercourse with MD, did Mereisi always give her consent?

A: Yes, my Lord.

Q: Did she ever say no to you?

A: Just once, my Lord.

Q: Did you have sex when she said no?

A: Yes, we had sex, my Lord.

Q: Even after she said no, you had sex with her?

78. An admission of this magnitude coming from the Accused while answering his own counsel is particularly harmful because it is perceived as a truthful, albeit voluntary, confession, rather than a statement forced under hostile questioning.

79. The information alleges that, sometimes between 1 June 2024 and 30 September 2024, at Sigatoka, the Accused had carnal knowledge of the Complainant, without her consent. The date of the alleged offence is not specified. What the Prosecution is required to prove is that the Accused, at least on one occasion during the said period, had carnal knowledge of the Complainant without her consent. The Accused admits to having sexual intercourse once, even after she said 'no'.
80. The Defence Counsel suggests from the Bar table that the said admitted non-consensual sexual intercourse was unspecified and may have occurred outside the charge period, perhaps in October or November. This suggestion is based on mere speculation and should be disregarded. The Accused did not specify a date, nor did he claim it occurred in October or November. The Accused was answering the charge framed in the information and not an uncharged offence. Defence cannot shift the focus to an "uncharged offence" simply by speculating on a different time frame without an evidential basis. If the Defence did not apply to exclude the evidence of the admitted act as irrelevant during the trial, it is generally considered admissible and relevant to the charges framed in the information.
81. Finally, the Defence argues that the Prosecution failed to meet the rule in *Browne v Dunn* in cross-examination by not confronting the Accused with the proposition that within the specific 'representative' count period of June to September 2024, he committed rape on at least one occasion.
82. The rule in *Browne v Dunn* (1893) is a principle of fairness in common law requiring a cross-examiner to put any contradictory evidence or new case theories to a witness while they are testifying. It ensures witnesses have an opportunity to explain discrepancies, preventing "trial by ambush" where evidence is challenged only during closing arguments.
83. First and foremost, the rape count was not representative. The information alleges that, sometimes between 1 June 2024 and 30 September 2024, at Sigatoka, the Accused had carnal knowledge of the Complainant, without her consent. The Accused, without any ambiguity, was made aware from the outset what he had to defend at the trial, although

the date of the offence was not specified. The learned Prosecutor did not put any contradictory evidence or new case theories to the Accused while he was testifying.

84. In a child rape case, the date of the offence may not be clear and making the date of the offence a vital particular in an information would be highly prejudicial to the best interests of a child, which are the primary consideration of the Court. Such a rigid requirement could also hinder the child's access to justice. Requiring a precise date when the child cannot provide one can result in the prosecution failing to prove the case beyond a reasonable doubt, despite strong evidence of the act itself. Modern legal practice often allows for a "time window" (e.g., between June and September) rather than an exact date to address these issues. I am not convinced that the rule in *Browne v Dunn* was violated, or that the Defence was prejudiced.
85. The Accused was not sure if he could engage in sexual acts with a co-worker at the workplace. He was a neighbour and an uncle of the Complainant. He must have known that the Complainant was a child and intellectually challenged. Being aware of these circumstances, the Accused took an unjustifiable risk and proceeded to have sexual intercourse with the Complainant without being sure if she was freely consenting. Taking an "unjustifiable risk" by acting without being sure of free consent constitutes recklessness.
86. I accept the Complainant's words that the sexual intercourse with the Accused occurred at the Beach House between June and September 2024 was not consented. I accept the evidence of the Prosecution and reject the Accused's defence of consent.
87. The Prosecution proved the charge beyond a reasonable doubt. I find the Accused guilty of Rape as charged. The Accused is convicted accordingly.



Aruna Aluthge

Judge

24 March 2026

At Lautoka

Solicitors:

Office of the Director of Public Prosecutions for the State
Anishini Chand Lawyers for the Defence