

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

**Criminal Case No.: HAC 178 of 2017**

**STATE**

**V**

**ENERIKO NAIKELEKELEVESI** also known as  
**EPINERI NAIKELEKELEVESI**

**Counsel** : Mr. J. Niudamu for the State.  
: Ms. J. Singh [LAC] for the Accused.

**Dates of Hearing** : 11 and 12 September, 2018  
**Closing Speeches** : 13 September, 2018  
**Date of Summing Up** : 13 September, 2018  
**Date of Judgment** : 14 September, 2018

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**JUDGMENT**

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

1. The Director of Public Prosecutions charged the accused by filing the following information.

## **FIRST COUNT**

### *Statement of Offence*

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

### *Particulars of Offence*

**ENERIKO NAIKELEKELEVESI** a.k.a **EPINERI NAIKELEKELEVESI**, on the 30<sup>th</sup> day of August, 2017 at Rakiraki in the Western Division penetrated the vagina of **ASB**, a 5 year old child with his finger.

2. In the summing up delivered by this court and in accordance with the evidence adduced, a direction was given to the assessors in respect of the lesser count of sexual assault as well.
3. The three assessors had returned with a unanimous opinion that the accused was not guilty of rape but guilty of the lesser offence of sexual assault.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called four (4) witnesses and the accused exercised his right to silence and did not call any witness.
5. The complainant a child of 6 years was called by the prosecution as its first witness. This court conducted a competency test to satisfy itself whether the complainant was able to understand the questions asked. After asking a series of questions the court was satisfied that the complainant was possessed with the ability and level of intelligence to understand the questions asked and answer the same. Furthermore, in accordance with section 117 (2) (b) of the Criminal Procedure Act the court decided to dispense with the administration of an oath taking into consideration the age of the complainant. The complainant gave unsworn evidence.

6. The complainant who was 5 years of age in 2017 informed the court, in August, 2017 her grandmother had told her to bring the cow's feet from a house nearby. She went with her younger sister, upon reaching the house the accused was in the kitchen boiling water.
7. The complainant was asked to come inside the kitchen. In the kitchen the accused removed her trousers, kissed her stomach and then poked her "mako" meaning her private part with his pointer finger.
8. The complainant cried as a result of what the accused did to her. Her grandmother after hearing the cry came. The complainant told her grandmother what had happened to her. The accused was in the kitchen at the time her grandmother came.
9. The second prosecution witness Alesia Nasau the grandmother of the complainant informed the court that on 30 August, 2017 she had sent the complainant and the complainant's sister Mereia Lewaniu to bring the cow's feet from the house of her younger sister.
10. After a while the witness heard the sound of someone crying coming from the house the complainant had gone to.
11. The witness ran and upon reaching the kitchen she saw the complainant crying. The complainant's trousers and panty were down to her thighs. When she arrived at the kitchen the accused was standing inside the kitchen. Alesia asked the accused what he had done to her granddaughter he denied doing anything. The witness responded by saying that he had done something because the complainant's shorts were down to her thighs.
12. When the witness saw the complainant she was shivering, she got hold of her granddaughter and went home. At home the witness asked the complainant what had happened. The complainant told her that the accused removed her shorts, kissed her stomach and poked her "mako".

13. The witness also stated that when she went to the house where the complainant was, the only person in the kitchen was the accused. The witness knows the accused who calls her aunty she identified the accused in court.
14. Dr. Emele Bolakoro who had examined the complainant on the day of the alleged incident recorded her findings in the Fiji Police Medical Examination Form which was marked and tendered as prosecution exhibit no. 1.
15. Upon physical examination of the complainant the doctor's specific medical findings were bruising noted on the right side of the labia minora. According to the doctor labia minora was part of the female reproductive system but the bruise was outside the female reproductive organ. In her professional opinion the bruise noted may have been from a blunt object or blunt trauma such as a finger.
16. The doctor referred to the diagram she had drawn in the Medical Examination Form and whilst explaining the diagram stated that on the right labia minora was a bruise which she had marked in the diagram.
17. The final prosecution witness was Constable Litiana Sevai who recorded the statement of witnesses and had conveyed the victim to the hospital. This officer had attended to the report of 30 August, 2017 the same day it was received.
18. The crime scene was about 10 to 15 meters away from the victim's house. During investigation the complainant had pointed out the accused in the village.
19. The defence on the other hand denies the allegation. The accused takes up the position that he did not penetrate the vagina of the complainant with his

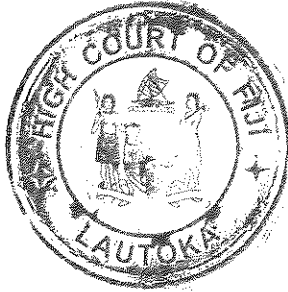
finger as alleged although he had met the complainant at Analaisa's kitchen door on 30 August, 2017 he did not do anything to the complainant.

20. I accept the evidence of the complainant as truthful and reliable she was able to give a coherent account of what the accused had done to her.
21. The complainant was also able to withstand cross examination and was not shaken. This court accepts that the accused had poked her private part with his finger but not to the extent of penetrating the vagina. A 5 year old child cannot be expected to precisely state her injuries considering the circumstances that prevailed at the time.
22. The findings of Dr. Bolakoro gives credence to the evidence of the complainant that there was some trauma caused to the private part of the complainant. The Doctor had seen upon the physical examination of the complainant that the bruise was outside the female reproductive organ. For clarity purposes the doctor referred to the diagram she had drawn in the Medical Examination Form.
23. The complainant had promptly told her grandmother about what the accused had done to her when her grandmother had taken the complainant away from where the accused was. This was the opportunity for the complainant to speak freely to her grandmother which she did.
24. The grandmother upon hearing the cries of the complainant immediately went to where the complainant was, she was concerned when she saw the complainant's trousers and panty down to her thighs. She saw the complainant was shivering so she got hold of the complainant and brought her home.
25. When the grandmother asked the complainant what had happened she was informed that the accused had removed her shorts, kissed her stomach and poked her private part.

26. Defence Counsel had raised an inconsistency in respect of the evidence of Alesia Nasau (PW2) given under oath with her police statement. According to the police statement the witness had mentioned that the complainant had informed her that one boy from Analaisa's house had done the act whereas in her evidence the witness had stated it was the accused. The witness denied making such a statement to the police officer who was writing her police statement she signed because she was asked by the police officer to do so.
27. The inconsistency is not significant to adversely affect the reliability of Alesia's evidence. It was an agreed fact that the accused was present at the crime scene and the undisputed evidence of this witness was that when she went to the kitchen where the complainant was, the only other person in the kitchen was the accused. The police officer who had attended to the report promptly informed the court that the complainant was able to point to the accused during investigation.
28. This court accepts the evidence of all the prosecution witnesses as truthful and reliable.
29. The defence has not been able to create a reasonable doubt in the prosecution case in respect of the lesser offence of sexual assault.
30. This court is satisfied beyond reasonable doubt that the accused on 30 August, 2017 had unlawfully and indecently assaulted the complainant by poking his finger outside the complainant's vagina causing injuries.
31. I agree with the unanimous opinion of the assessors that the accused is not guilty of rape, since there is no evidence to prove beyond reasonable doubt that the accused had penetrated the vagina of the complainant with his finger. I also agree with the unanimous opinion of the assessors that the accused is guilty of the offence of sexual assault.

32. In view of the above, I acquit the accused of the count of rape but find him guilty of the lesser offence of sexual assault and I convict him accordingly.

33. This is the judgment of the court.



**Sunil Sharma**

**Judge**

**At Lautoka**

**14 September, 2018**

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**