

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 12 of 2020

STATE

v

MARIKA KOROVATA

Counsel : Ms. Kimberly Semisi for the State
Ms. Lice Manulevu with Ms. Frances Singh for the Accused

Dates of Trial : 1-5 March 2021
Closing Submissions : 8 March 2021
Judgment : 16 March 2021

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "AS".

JUDGMENT

[1] The Director of Public Prosecutions (DPP) has charged the accused, Marika Korovata, with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2016 to the 31st day of December 2016, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of AS, a child under the age of 13 years, with his penis.

COUNT TWO

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2017 to the 31st day of December 2017, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of AS, a child under the age of 13 years, with his penis.

COUNT THREE

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2018 to the 31st day of December 2018, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of AS, a child under the age of 13 years, with his penis.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2019 to the 29th day of October 2019, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of AS, a child under the age of 13 years, with his penis.

COUNT FIVE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act.

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2019 to the 29th day of October 2019, at Koroibici Settlement, Lokia, in the Eastern Division, unlawfully and indecently assaulted **AS**, a child under the age of 13 years, by touching her breasts.

COUNT SIX

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, on the 30th day of October 2019, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the anus of **AS**, a child under the age of 13 years, with his penis.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 5 days. Thereafter, the Learned Counsel for the State and Defence made their closing submissions.

The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Decree (Act)—

"legal burden". in relation to a matter, means the burden of proving the existence of the matter.

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

[5] As could be observed the accused is charged with 5 counts of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act.

[6] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[7] Section 207(2) of the Crimes Act is reproduced below:

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

[8] Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic or legal euphemism (synonym) for sexual intercourse. In terms of Section 206 (5) the term carnal knowledge includes sodomy or anal sexual intercourse.

[9] Section 207(3) of the Crimes Act provides that *"For this section, a child under the age of 13 years is incapable of giving consent."*

[10] Therefore, in order to prove the first count of Rape, the prosecution must establish beyond reasonable doubt that;

(i) The accused;

(ii) During the specified period (In this case between the 1 January 2016 and 31 December 2016);

(iii) At Koroibici Settlement, Lokia, in the Eastern Division;

(iv) Penetrated the vagina of the complainant AS, with his penis;

(v) At the time the complainant AS was a child under the age of 13 years.

[11] In order to prove the second count of Rape, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case between the 1 January 2017 and 31 December 2017);
- (iii) At Koroibici Settlement, Lokia, in the Eastern Division;
- (iv) Penetrated the vagina of the complainant AS, with his penis;
- (v) At the time the complainant AS was a child under the age of 13 years.

[12] In order to prove the third count of Rape, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case between the 1 January 2018 and 31 December 2018);
- (iii) At Koroibici Settlement, Lokia, in the Eastern Division;
- (iv) Penetrated the vagina of the complainant AS, with his penis;
- (v) At the time the complainant AS was a child under the age of 13 years.

[13] In order to prove the fourth count of Rape, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case between the 1 January 2019 and 29 October 2019);
- (iii) At Koroibici Settlement, Lokia, in the Eastern Division;
- (iv) Penetrated the vagina of the complainant AS, with his penis;
- (v) At the time the complainant AS was a child under the age of 13 years.

[14] Similarly, in order to prove the sixth count of Rape, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On 30 October 2019;

- (iii) At Koroibici Settlement, Lokia, in the Eastern Division;
- (iv) Penetrated the anus of the complainant AS, with his penis;
- (v) At the time the complainant AS was a child under the age of 13 years.

- [15] To further elaborate upon these elements in respect of the 5 counts of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [16] The second element relates to the specific time period during which the offence was committed. In respect of count 6 it would be the specific date as stated in the charge. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [17] In relation to counts 1-4, the fourth element involves the penetration of the complainant's vagina, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.
- [18] In relation to count 6, the fourth element involves the penetration of the complainant's anus, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the anus of the complainant with his penis to any extent.
- [19] The final element is that at the time of the incident the complainant was a child under 13 years of age. The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As would be seen later in this judgment, the complainant in this case was under 13 years old at the time of the alleged incidents, and therefore, she had no mental capacity to consent.

[20] The fifth count against the accused is a charge of Sexual Assault. The offence of Sexual Assault is defined in Section 210 (1) of the Crimes Act as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—

*(a) unlawfully and indecently assaults another person; or
(b)*

[21] Therefore, in order to prove the fifth count of Sexual Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case between the 1 January 2019 and 29 October 2019);
- (iii) At Koroibici Settlement, Lokia, in the Eastern Division;
- (iv) Unlawfully and indecently assaulted AS, the complainant, by touching her breasts.

[22] To further elaborate upon these elements. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[23] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[24] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for Court to consider and decide whether the touching of the breasts of the complainant by the accused, is an indecent act and thereby amounts to Sexual Assault.

The Agreed Facts

[25] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "Agreed Facts" without placing necessary evidence to prove them:

1. THAT the complainant in this matter is AS.

2. THAT MARIKA KOROVATA is charged for the alleged offences.
3. THAT the complainant was 9 years old in 2016.
4. THAT the alleged incident occurred at Koroibici Settlement, Lokia, Nausori.
5. THAT MARIKA KOROVATA does not dispute the existence of the medical report dated 6th of November 2019, however disputes the content.
6. THAT MARIKA KOROVATA is related to the complainant as he is her maternal grand-father.
7. THAT MARIKA KOROVATA financially supported the complainant after the complainant's mother had passed away in 2016.

[26] Since the prosecution and the defence have consented to treat the above facts as "Agreed Facts" without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

Case for the Prosecution

[27] The prosecution, in support of their case, called the complainant (AS), her grandaunt, Tokasa Nora, the complainant's aunt, Mereseini Rokowati and Medical Officer, Dr. Losana Burua. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit PE1- Birth Certificate of the complainant.

Prosecution Exhibit PE2- Medical Examination Report of the complainant.

[28] Evidence of the complainant AS

- (i) *During the recording of the complainant's evidence a screen was placed so that the complainant could not see the accused and her evidence was recorded in a closed court. Court also permitted a Counsellor Advocate from the Fiji Women's Crisis Centre (FMCC) to sit beside the complainant as a 'support person'. Later a Teacher from the Nausori Special School was also present to assist in the recording of the complainant's evidence.*
- (ii) *The complainant testified that she is currently 13 years old. She confirmed that her date of birth was 11 June 2007. She is residing at Koroibici Settlement in Toga, Rewa. She is currently schooling at Nausori Special School.*
- (iii) *The witness said that she is staying at the Koroibici Settlement with her grand-father, Osea Tunidau, her grand-mother, Tokasa Nora, her aunty Mereiwai Rabaka and her great grand-mother, Mereseini Rokowati.*

- (iv) *The complainant said that her mother had passed away when she was in Class 4. When asked about her father she said: "I don't have a father".*
- (v) *She has been attending the Nausori Special School since last year (2020). From 2016-2019 (Class 4-7), she had been attending Nakaikogo Sanatan Primary School.*
- (vi) *The complainant agreed that in the year 2016 she was 9 years old, and that she turned 10 in 2017, 11 in 2018 and 12 in 2019.*
- (vii) *The complainant said that after her mother passed away she had stayed with her great grand-mother, Mereseini Rokowati.*
- (viii) *The complainant agreed that the accused, Marika Korovota, is her mother's father (her maternal grand-father). She refers to the accused's wife as Bu Mari or Grand-mother Mari. Both the accused and his wife reside in Koroibici Settlement.*
- (ix) *The complainant first testified to an incident which she said happened at the time she and Bu Roko were cooking potato in the kitchen of Bu Roko's house. She later explained that Bu Roko, who is also known as Bu Roks, is her grand-aunt Loata's daughter. Thus Bu Roko, although of same age as the complainant or even younger, is her aunt. The said Bu Roko is the namesake of Mereseini Rokowati, who is the complainant's great grand-mother (The accused and Tokasa Nora's mother). The said Bu Roko is schooling at Nakaikogo Sanatan Primary School and was in Class 5.*
- (x) *The complainant said that while she was cooking potato in the kitchen of Bu Roko's house the accused had called her from his house. She had then gone to his house. The accused had then closed the door and pushed her into the bed, inside the bedroom. Thereafter, he had put his private part on her anus. The witness used the iTaukei terms 'yaya tabu' for private part and 'cici' for anus.*
- (xi) *When asked if she knows any other name for the male private part she said balls (polo). When asked as to what this male private part is used for the witness said this is the place from which he pees (She used the term 'mimi kind') or from where pee comes out from.*
- (xii) *When asked which part of the anus the witness said "my bum"; and when asked which part of the bum she said: "At the back". When asked to explain further the witness said: "He inserted into my anus". The complainant said that the accused had done this for a long time and that it was painful and she had cried. She further said that while the accused was inserting his male private part into her anus, he had used his hands and closed her mouth [The witness demonstrated as to how this had happened].*
- (xiii) *Later it was revealed from the complainant's evidence that this incident took place in the year 2019, when she was in Class 7.*
- (xiv) *Thereafter, the accused had asked the complainant to go outside. So she had left the accused's house and gone to her grand-mother Tokasa Nora's house.*
- (xv) *The complainant said that her aunt Mereiwai Rabaka had told (something) to her grand-mother Tokasa Nora. Her grand-mother had then called her and*

- asked her questions about her grand-father Marika. The complainant said: "I told her that he did bad things to me". "He put his male private part on my anus".
- (xvi) The complainant said that the incident above referred to had happened during day time. At the time she was wearing black pants and a black t-shirt. At the time the accused had inserted his male private part into her anus, he had taken off her black pants. When asked about her top/black t-shirt, the witness said: "He only touched my breast". When asked how he touched her breast she said: "Inside". When asked to explain further the witness said: "Inside like this" and demonstrated how the accused had touched her breast. The complainant testified that the accused had touched her breast inside of the black t-shirt she was wearing.
- (xvii) At the time the above incidents happened the witness said the accused's son Epi, was in the house and was watching TV. Apart from Epi, Taitai Manasa (grand-father Manasa) was also at home and he was lying down on his bed.
- (xviii) The complainant was asked whether any other incident happened in the year 2019 (when she was in Class 7). The witness said: "He spread a sack and told me to lie down". She said this incident happened in the forest, and that she went to the forest because the accused had said for them to go to the forest together. When asked to explain further the witness said: "It was like a tree. He spread the sack below the trees and then he inserted his male private part inside my mimi".
- (xix) The witness explained further that by 'he', she is referring to the accused. For male private part she again used the iTaukei term 'yaya tabu', and she explained the part where he pees from. By 'mimi' she said she is referring to the part where her pepe is. When asked as to what she uses the pepe for the witness said: "Where I pee".
- (xx) The complainant further testified that this forest was far and that she had walked to the forest with the accused. At the time there was no one else in the forest. She said that the accused always goes and weeds in the forest.
- (xxi) At the time of this incident the complainant said that she was wearing a skirt and a t-shirt. Inside she was wearing a vest and a panty. She said the accused had taken off her skirt and her panty.
- (xxii) The complainant said that at the time the accused inserted his male private part into her mimi, it was painful and that he had done this for a long time. She had cried. Then he had kissed her mouth. Thereafter, the accused had told her to go home and she had done so. She said that this incident had happened in the afternoon.
- (xxiii) The witness was asked whether this alleged incident happened before or after the incident where he inserted his male private part into her anus. She said thus: "After the incident she told us this morning".
- (xxiv) The complainant said she did not tell anyone about the incident because her grand-father Marika had told her not to tell anyone.

(xxv) The complainant next testified to an incident which took place in the year 2018 (when she was in Class 6 and 11 years old). At this time the witness said that she was staying with her grand-mother Bu Nora or Tokasa Nora at the Koralbici Settlement and was attending Nakaikogo Sanatan Primary School.

(xxvi) The witness said: "I was sleeping in the night after that he woke me up after that he told us to go to the back of the kitchen". By 'he' she said she meant her grand-father Marika. She explained that that night she was sleeping in the sitting room of the accused's house. Epi, grand-mother Mari (Bu Mari), Ana and Tokasa (namesake of grand-mother Tokasa Nora), and Wainisa were the others in the sitting room at the time.

(xxvii) When asked to explain as to how she knew it was the accused who woke her up, she said: "Because I saw his face". She explained that there was a solar light in the middle – inside the house and that the light was bright.

(xxviii) The following questions were then asked from the witness and she answered as follows:

Q. When your grand-father Marika had woken you up did you see his face?

A. Yes.

Q. You saw his face clearly?

A. Yes I saw his face clearly.

Q. What happened after that?

A. He called me.

Q. What did he say?

A. He told me to go to the back of the kitchen.

Q. Then what did you do?

A. Then I went.

Q. What were everybody else doing at the time?

A. They were pressing their phone.

Q. What do you mean by pressing their phone?

A. The witness gave no answer to this question.

Q. You said all the others were sleeping in the sitting room at the time?

A. Yes.

Q. At the time grand-father Marika woke you up were the others asleep at the time or were they pressing their phones?

A. They were sleeping.

- Q. *You said you went. Where did you go to?*
A. *At the back of the kitchen.*
- Q. *Where exactly is this back of the kitchen?*
A. *The kitchen is inside – at the back outside.*
- Q. *Where did your grand-father go?*
A. *He came later.*
- Q. *Then what happened when you went to the back of the kitchen outside?*
A. *After that he made me lie down and then he put his male private part in my mimi.*
- Q. *How exactly did he make you lie down?*
A. *He made me lie bending backwards [witness demonstrated as to how this happened].*
- Q. *When you say male private part which part are you referring to?*
A. *Where he pees.*
- Q. *What do you call that part?*
A. *I don't know.*
- Q. *You recall what you were wearing at the time?*
A. *I was wearing pants with a panty and a vest.*
- Q. *What was he wearing?*
A. *I can't remember.*
- Q. *What happened to the clothes you were wearing?*
A. *He took off my pants.*
- Q. *What did he do after he took off your pants?*
A. *He then put his private part onto my mimi.*
- Q. *What about your panty?*
A. *He took it off.*
- Q. *When you say mimi which part are you referring to?*
A. *From where I pee.*
- Q. *Which part of your mimi did he insert his private part into?*
A. *He inserted into my pepe.*

Q. When you say pepe which part are you referring to?

A. From where I pee.

Q. How did you feel at the time when he put his male private part into your pepe?

A. It was painful.

Q. What part was painful?

A. My mimi.

Q. What did you do when he was doing this to you?

A. He told me to shut up and stay still.

Q. Then what did he do?

A. Then he kissed my mouth.

Q. When he was inserting his male private part into your mimi was it for a short time or long?

A. It was long.

Q. Did you call out for help at that time?

A. No because he shut my mouth.

Q. How did he do that?

A. He used his hands.

Q. Then what happened?

A. He told me to go home.

(xxix) The complainant said that thereafter, she had gone back and slept. She had not informed anybody about this incident as she was afraid of the accused.

(xxx) The complainant next testified to an incident which took place in the year 2017 (when she was in Class 5 and 10 years old). At this time the witness said that she was staying with her grand-mother Bu Nora or Tokasa Nora and grand-father Osea, at the Koroibici Settlement and was attending Nakaikogo Sanatan Primary School.

(xxxi) The witness said that she was playing outside when the accused had called her from his house. When asked as to what the accused said when he had called her, the witness said: "For us to go to the forest". When asked as to where this forest is she said at the cassava patch and that it is far. She had then gone to the forest with the accused. They had walked. After going to the forest the accused had told her to lie (down).

(xxxii) The following questions were then asked from the witness and she answered as follows:

Q. What happened when you went to the forest with your grand-father Marika?

A. He did bad things to me.

Q. What bad things did he do to you?

A. He took out his male private part and put it on my mimi.

Q. Which male private part?

A. Where he pees.

Q. When you say 'mimi' which part are you referring to?

A. It is the place where I pee (where the pee comes).

Q. Which part of your mimi did he put his male private part on?

A. Inside my mimi.

Q. What were you wearing at that time?

A. I was wearing a short and t-shirt, and a vest and sports bra with my panty.

Q. What was your grand-father Marika wearing?

A. I don't know.

Q. What do you mean you don't know?

A. It was a black trouser and a t-shirt. That's it.

Q. When your grand-father had put his male private part inside your mimi were you wearing any clothes at the time?

A. He took off my panty.

Q. What about grand-father Marika – was he wearing any clothes at the time?

A. He took his clothes off.

Q. Did you see anybody else at the forest at that time?

A. No.

Q. How did you feel when he had done this to you?

A. It's not good.

Q. How long did he do that for – was it for a short time or long time?

A. It was long.

Q. What were you doing when he was doing this?

A. He told me to stay still.

Q. What did you do after he told you this?

A. And I cried.

Q. Why?

A. Because it was painful.

Q. What was painful?

A. My mimi was painful.

Q. What did he do (when you were crying)?

A. He told me to go.

.....

Q. After he told you to go what did you do?

A. I went home. I went alone. I walked.

Q. What about grand-father Marika?

A. He was weeding.

Q. What about your clothes (your panty that he had taken off)?

A. I forgot to wear it again.

(xxxiii) The complainant said that after this incident she had gone to her grand-father Marika's home. She had not told anyone about the incident because she was afraid of the accused.

(xxxiv) The complainant next testified to an incident which took place in the year 2016 (when she was in Class 4 and 9 years old). At this time the witness said that she was staying with her grand-mother Bu Nora or Tokasa Nora and grand-father Osea, at the Koroibici Settlement and was attending Nakaikogo Sanatan Primary School. This was the same year that her mother had passed away.

(xxxv) The complainant testified that the accused had called her and wanted the two of them to go to the forest. At the time the accused called her she said she was sitting beside the tamarind tree. When asked what her response was, she said: "I said no. Then he told me for us to go". So the complainant had gone with the accused to the forest. They had walked.

(xxxvi) The following questions were then asked from the witness and she answered as follows:

Q. *What happened when you reached the forest?*

A. *He spread a sack.*

Q. *Where did he spread a sack?*

A. *At the mango tree.*

Q. *Is this forest close or far from home?*

A. *It is far from home.*

Q. *What happened after that?*

A. *He then told me to lie down on the sack.*

Q. *Did you lie down on the sack?*

A. *Yes.*

Q. *What were you wearing at the time?*

A. *I was wearing a dress and tights plus panty and sports bra.*

Q. *What about grand-father Marika? What was he wearing?*

A. *No.*

Q. *What do you mean no?*

A. *I don't know.*

Q. *What was grand-father Marika wearing?*

A. *He was wearing blue trousers and one t-shirt. That's it.*

Q. *You said you had laid down on the sack?*

A. *Yes.*

Q. *Why did you lie down on the sack at that time?*

A. *Because he took off my dress and then he took off my tights and panty. After that he put his male private part on my mimi.*

Q. *Which male private part?*

A. *He inserted it inside my mimi.*

Q. *What did he insert inside your mimi?*

A. *His male private part.*

.....

Q. *Which male private part are you referring to?*

A. *His 'soresore' (scrotum).*

Q. What does he use that part for?

A. He uses it for peeing.

Q. When you say 'mimi' which part of your body are you referring to?

A. It is the part where I pee.

Q. How long was that for?

A. It was long.

Q. How did you feel at that time?

A. It was not good.

Q. And while he was doing this to you what were you doing?

A. He told me to shut up (he said keep quiet).

Q. What happened after he said this to you?

A. Then he put his male private part onto my mimi.

Q. Did you shout out for help at that time?

A. Yes.

Q. What happened when you shouted out for help?

A. Then he shut my mouth.

Q. How did he do that?

A. He used his hand.

Q. Then what happened?

A. After that I went home.

Q. How were you feeling at that time?

A. It was not good.

Q. When you went home did you inform anybody?

A. No.

Q. Why not?

A. Because I was afraid that grand-father Marika will hit me.

(xxxvii) The complainant testified that she went to the Police Station and gave a statement regarding these incidents. The said statement has been recorded on 7 November 2019. She had also been medically examined by a female doctor.

- (xxxviii) The complainant identified the accused in the dock as her grand-father Marika.
- (xxxix) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.
- (xl) It was suggested to the complainant that the accused never asked her to go to the forest with him in the year 2016 when she was in Class 4 and 9 years old. It was further suggested that the accused had never told her to lie down in the forest and that he never put his male private part into her mimi. The complainant denied these suggestions and said that the accused did so.
- (xli) It was suggested to the witness that she never shouted for help because nothing had happened. However, she answered by saying: "Because he had shut my mouth". It was further suggested that she never told anyone about what had happened because nothing had happened to her. The complainant answered: "Because I was afraid of my grand-father because he will hit me".
- (xlii) The complainant agreed that she only goes to the forest with her grand-mother Mari. However, when it was suggested to her that her grand-father Marika never takes her to the forest, she replied: "We went together to the forest".
- (xliii) Similarly, it was suggested to the complainant that the accused never asked her to go to the forest with him in the year 2017 when she was in Class 5 and 10 years old. It was further suggested that the accused had never told her to lie down in the forest and that he never put his male private part into her mimi. The complainant denied these suggestions and said that the accused did so.
- (xliv) It was suggested to the witness that she never shouted for help because nothing had happened. However, she answered by saying: "I wanted to shout but then he closed my mouth". It was further suggested that she never told anyone about what had happened because nothing had happened to her. The complainant answered: "It happened".
- (xlv) It was suggested to the complainant that around the month of August 2017 the accused had an injury on his leg and due to that fact he was using a wheelchair. It was also suggested to her that the injury on his leg lasted for about 1 year and due to this he was not able to walk around. It was further suggested that in the year 2018 that the accused's leg was still injured and that he was using crutches to walk and had a cement cast on his injured leg.
- (xlvi) It was suggested to the complainant that the accused never wake her up in the night in the year 2018 when she was in Class 6 (and 11 years old). It was further suggested that the accused had never told her to go outside of the house that night and that he never put his male private part into her mimi. The complainant denied these suggestions and said that the accused did so.
- (xlvii) It was suggested to the witness that she never shouted for help when the accused was taking her outside or while she was outside that night. It was further suggested that if she had shouted out the others in the house would have heard her and woken up. The complainant said: "They were sleeping". It was further suggested that she never told anyone about what had happened

- because nothing had happened to her that night. The complainant answered: "Because I was afraid of my grand-father that he will hit me".*
- (xlviii) It was suggested to the complainant that the accused never took her into a room in his house in the year 2019 when she was in Class 7 and 12 years old. It was further suggested that the accused had never pushed her on the bed in the room, and that he never removed her clothes and that he never inserted his male private part into her anus on that day. The complainant denied these suggestions and said: "He inserted his male private part into my anus".*
- (xlix) It was also suggested to the witness that she never shouted for help because this incident did not happen. She replied that it happened. It was also suggested to her that she never told anyone about what happened in the room of the accused's house. The witness said that she told Bu Roko or Bu Roks.*
- (i) It was further suggested to the complainant that apart from the incident which happened in the room in 2019, that her grand-father Marika never inserted his male private part into her mimi (while in the forest). It was also suggested that the accused never touched her breast. She said that he touched her breast.*
- (ii) It was further suggested that she never shouted for help or told anyone about this incident because it never happened. The witness answered that it happened.*
- (iii) The complainant agreed that her grand-father Marika and her grand-mother Mari were looking after her and that they will prepare lunch for her and buy everything that she would require for school. She also agreed that her grand-father Marika and grand-mother Mari love her and that they will discipline her only if she did something bad. The complainant also agreed that she has a good relationship with her grand-mother Mari.*
- (iv) The complainant was questioned about the statement she made to the police. She agreed that at the time she was making her police statement, which was recorded by a Lady Police Officer, her grand-mother Tokasa Nora was also present. It was also suggested to her that her grand-mother was assisting her in answering the questions put to her by the police.*
- (v) However, when the complainant was asked the following question: "You would agree with me that when the Lady Officer was asking you about what your grand-father Marika did to you, your grand-mother Tokasa had told you how to answer the questions?", she replied: "It is only me".*
- (vi) The Defence highlighted certain inconsistencies in the testimony given in Court by the witness vis a vis her statement made to the Police on 7 November 2019:*
- i. In her testimony in Court, the witness said that the incident which happened in 2018, when she was in Class 6 and 11 years old, took place one night at the back of the kitchen.*

However, in her statement made to the Police (Questions 39-41 of the iTaukei version & Questions 40-42 in the English version), it is recorded that the incident took place in his farm.

The complainant agreed that she had said so in her Police Statement.

- ii. In her testimony in Court, the witness said that the other alleged incident which happened in 2019 (when she was in Class 7 and 12 years old), took place in the forest after the accused had taken her there.

However, in her statement made to the Police (Question No. 26 of both the iTaukei version and the English version), it is recorded as follows:

"At one time in the night just this year I was sleeping in his house and he came and woke me up, and he took me outside beside his kitchen and he made me lay down on the ground, and he removed my pants and laid on top of me."

The complainant agreed that she had said so in her Police Statement.

- (iv) In re-examination, the State Counsel attempted to clarify from the witness the answers given by her in cross examination.

[29] Evidence of Tokasa Nora

- (i) The witness testified that she is the grand aunt of the complainant. She lives at the Koroibici Settlement in Togo, Rewa. She testified that the reason the area is called Lokia is because Koroibici is in Lokia Road.
- (ii) She testified that she is married with 4 children. Currently she is living with her husband, her 3 children, 2 grand-children, her mother and the complainant. Her mother's name is Mereseini Rokawati.
- (iii) The witness said that the complainant's grand-father is Marika, who is her brother. Marika's daughter is Senimilli Wasevolau, and the complainant is Senimilli's daughter. Therefore, the complainant is her grand-niece. The complainant's mother had passed away in 2016.
- (iv) The witness testified that after the complainant's mother passed away, and before the alleged incidents happened, the complainant used to stay with the accused Marika, who was looking after her and her education. The complainant used to come and visit her great grand-mother, who is my mother. She said that in the years 2016, 2017, 2018 and up to 31 October 2019, the complainant was staying with the accused Marika and his wife, Mari.

- (v) On 31 October 2019, the complainant came to live with her family and all her clothes were brought. She said: "Marika's wife brought her clothes and she left it in front of our door outside".
- (vi) Tokasa Nora said that the distance between her house and her brother Marika's house was about 10-15 steps. She said the distance was like from the witness box to the end of the building where the steps are – steps close to the Criminal Registry.
- (vii) The witness testified that the complainant is currently attending the Nausori Special School. She has been there since 2020, for over a year now. Prior to that the complainant was attending Nakaikogo Sanatan Primary School.
- (viii) The witness said that the complainant is now 13 years old and will be turning 14 on June 11 this year. The complainant's birth certificate was tendered to Court as Prosecution Exhibit PE1.
- (ix) The witness further testified that her mother, Mereseini Rokowati, has a namesake. She is referred to as Bu Roko. Bu Roko is her younger brother's daughter. The witness also said that she has a namesake (Tokasa) who is one of the accused's daughters.
- (x) When asked whether she was aware of any injury that the accused had sustained in 2017, the witness said that she recalls him having an injury on his lower leg, which is sustained from where he was working at the time. From her understanding he had been injured for about 4 to 5 months. He had used a wheelchair for a short period of about 1 month. Thereafter, he had started using crutches. She said: "Because the place we were staying was wet and rugged and it was hard to use a wheelchair".
- (xi) When asked after the 4 to 5 months, what happened, Tokasa Nora answered: "Because after that his cement cast was removed and because their bathroom and toilet was at the back of their house, we could clearly see him using the crutches and he was also forcing himself to go to work". The witness continued that when the cement cast was removed they had seen him going to work.
- (xii) The witness testified to an incident that took place in the afternoon of 31 October 2019. She said she had come home from work that afternoon. She had been working as a house girl. Her daughter Merewai had informed her about something that she had got to know. Thereafter, the witness had called the complainant and asked her about what kind of bad things her grand-father had done to her. The complainant had started crying. The witness had then again asked the complainant (slowly) of what bad things the grandfather did to her. The complainant responded and said: "Veicai" to mean sexual intercourse.
- (xiii) Thereafter, the witness said that she had gone to Marika's house. She had called his wife and told her to come with her to her house so that she can hear for herself what the complainant had alleged. She continued that Marika's wife had then heard about the allegation from the complainant. The witness had told Mari that she was going to report the matter to the Police Station.

- (xiv) Accordingly, about 1 or 2 days later, the witness said that she had gone to the Nausori Police Station and made a statement. The complainant too had made a statement to the police. The complainant had also been taken for a medical examination and she had accompanied her.
- (xv) The witness identified the accused in the dock as her brother Marika.
- (xvi) It was suggested to the witness in cross-examination that the accused was injured for about one year. The witness said no. "The reason why I'm saying no it's not one year. Because after a while his cement cast was removed and he started going back to work".
- (xvii) In cross-examination the witness was referred to the statement made by her to the police on 7 November 2019. The Defence highlighted the following inconsistency and omission in the testimony given in Court by the witness vis a vis her statement made to the Police:

- i. In her testimony in Court, the witness said that she had asked the complainant as to what kind of bad things the accused had done to her.

However, in her statement made to the Police, it is recorded as follows:

"Then I slowly asked her to tell me everything then she told in iTaukei language 'O Taitai cakava vei au na ka ca' meaning that her grandfather always do bad things to her. Then I knew straight away that her grand-father had sexually abused her".

- ii. In her testimony in Court, the witness said that when she inquired from the complainant as to what bad things the accused had done to her the complainant had said 'veicai' to mean sexual intercourse. However, no mention has been made of this fact in her statement made to the Police.

- (xviii) The witness agreed that there is no mention in her statement about the complainant saying anything to her about what exactly her grand-father did to her (what exact bad things her grand-father had done to her).
- (xix) Takasa Nora also testified that she was not present at the time the complainant's statement was recorded by the police. However, she admitted that her signature appears on the statement, along with that of the complainant.
- (xx) It was suggested to the witness that she was actually sitting with the complainant, when the complainant's statement was being recorded. It was further suggested that when the Lady Police Officer was recording the complainant's statement that she was present and assisting the complainant

in answering the questions. However, the witness denied this suggestion and said that she was not present at the time the statement of the complainant was being recorded.

[30] Evidence of Mereseini Rokowati

- (i) The witness testified that she is 10 years old. She is schooling at Nakaikogo Sanatan Primary School and is currently in Class 5.*
- (ii) The witness said that she lives at Koroibici Settlement in Toga, Rewa. She said that she is staying there with her mother Loata Tabua, her father Sailosi Sauturaga and her siblings.*
- (iii) She is referred to by her family as Bu Roko or Bu Roks.*
- (iv) She said the complainant is her cousin sister. Later she said the complainant's mum and she are sisters. Therefore, the complainant is more like her niece.*
- (v) The witness testified that in 2019 she was in Class 3 and attending the same school. One day that year she and the complainant had come back from school. They had been cooking potatoes at her house. At that point the complainant's grand-father, Marika Korovata, had called the complainant from his house. The complainant had gone. After that Marika had closed the door.*
- (vi) After the potato was cooked the witness had called for the complainant but no one had responded. She had then gone to Marika's house and pushed the front door, but it was locked.*
- (vii) The witness said that beside the front door there was an iron window and it was opened. Then she had peeped through the window. It was day time. She could clearly see through the window. She said: "I saw AS lying on bed facing down and her grand-father on top of AS facing down".*
- (viii) When asked as to what Marika was doing on top of the complainant the witness said: "He was doing something bad"..... "He took out his private part and he was doing something bad on AS".*
- (ix) The witness explained that by private part she meant polo. When asked what this private part is used for she said: "He uses the polo when he goes to the washroom to pee". When asked what the accused was doing with his polo, the witness said: "He had inserted his polo into AS's 'muna' (backside)". When asked to explain further the witness said 'cici' to mean anus.*
- (x) The witness testified that thereafter, she went to tell the story to her friend.*
- (xi) After the complainant came out of Marika's house they were sitting together. When they (herself and two other friends) asked the complainant what she was doing inside Marika's house, the complainant hadn't responded and had cried. The complainant had then left.*
- (xii) In cross-examination the witness said that she had first seen what had happened inside Marika's house and then relate the story to her friend Vandana.*

[31] Evidence of Dr. Losana Burua

- (i) *The Doctor testified that she is a Private General Practitioner and is currently working at Medical Services Pacific (MSP) in Suva. She has been working at MSP for the past one year. Her main function at MSP is to look after post-rape victims.*
- (ii) *She had obtained her MBBS Degree from the Fiji School of Medicine in 1998. Thus she has been a Medical Practitioner for the past 22 years.*
- (iii) *She testified that Dr. Elvira Ongbit had been working at MSP in Suva prior to her. She did not work with Dr. Ongbit in person. But she is familiar with Dr. Ongbit's writing and the case write-ups of the clients she had seen. The witness confirmed that Dr. Ongbit is no longer working at the MSP Clinic.*
- (iv) *The witness said that a medical examination on the complainant was conducted by Dr. Elvira Ongbit, on 6 November 2019, at 12.40 p.m. at the MSP Clinic. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE2.*
- (v) *As per the initial impression of the person examined (Column D11) it is stated shy, soft-spoken, consistent with her statement.*
- (vi) *The Doctor testified as to the specific medical findings as found in column D12. Under vaginal examination, it is stated:*
 - *Examined in supine position – meaning child is lying down facing upwards.*
 - *Vaginal opening – wide, elastic, accommodating 2 fingers with ease.*
 - *Healed hymenal laceration at 3.00 o'clock, 5.00 o'clock, 7.00 o'clock and 9.00 o'clock positions.**Under anal examination, it is stated:*
 - *Examined in supine position – meaning child is lying down facing upwards.*
 - *Fresh (healing process) dark pink in colour, superficial laceration soft at 6.00 o'clock position in the anus.*
- (vii) *The Doctor further explained these findings with reference to diagram drawn by Dr. Ongbit at Appendix 1.*
- (viii) *The Doctor explained that a healed hymenal laceration means there is a break in the hymen or a tear of that membrane. It has healed over time. When asked to explain the time frame of the healed hymenal laceration, the Doctor said it could be from few months to years. The injury had happened long time ago.*
- (ix) *As to the anal examination, the Doctor was asked to explain the fresh injuries in the anus, which was in a healing process. The Doctor said these injuries could have happened within hours to 4-6 weeks.*

- (x) *When asked to explain the finding 'dark pink in colour' the Doctor said: "Initially fresh wound would look red and during the healing process the wound changes colour. It would look like a bruise – bluish, blackish, and purplish. Then tissues start to heal. It would come up to the surface and would be looking pinkish in colour."*
- (xi) *When asked for her professional opinion of the causes or reasons for the healed hymenal lacerations as noted by Dr. Ongbit, the witness said from experience the main reason would be excessive or repetitive penile penetration. Similarly when asked for her professional opinion of the causes for the superficial laceration on the anus as noted by Dr. Ongbit, the witness said the probable cause could be penile penetration.*
- (xii) *When asked to explain by Gravity: Excessive Force (in Column D14) the Doctor said this could be due to the force exerted from a male erect penis.*
- (xiii) *In cross-examination the Doctor said that the injury on the anus could have taken place within a few hours to 4-6 days. Since it was a fresh injury it could be within 6 days.*
- (xiv) *However, this position was not clarified by the State in re-examination.*

[32] At the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that the accused had committed the offence he is charged with in Count 6. Accordingly, the accused was found not guilty and acquitted of the said charge. The reasons for this decision will be further elaborated upon later in this judgment.

[33] However, this Court decided to call for the defence in respect of Counts 1-5. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[34] The accused decided to testify on his own behalf.

Case for the Defence

[35] Evidence of Marika Korovata

- (i) *The witness testified that he is 65 years old. He is currently residing at Caubati. He is a Plaster man by profession.*

- (ii) *The witness said that the complainant AS is his grand-child. The complainant's mother Senimilli is his daughter. In 2016, when the complainant was in Class 4, her mother had passed away.*
- (iii) *When asked as to who was supporting the complainant after her mother had passed away, the witness said: "We were the only ones supporting her". He explained by 'we' he meant himself and his wife Mari.*
- (iv) *After her mother had passed away in 2016 the complainant had come to live with his mother namely Mereseini Rokowati, who is her great grand-mother. He said that they were still supporting the complainant. He explained: "We were supporting her by buying her school uniforms and whatever she wants us to buy we buy. We were buying her food as well and school lunch and clothes. And we also provide her fare to school".*
- (v) *Even before the complainant's mother passed away, they were living at his mother's house which was in front. He explained that his house was at the back and his mother's house was in the front.*
- (vi) *When asked as to how long the complainant was staying with her great grand-mother Mereseini, the witness said that she was staying there until she left to stay with Bu Nora, or Tokasa Nora, who is his sister. The complainant moved to Tokasa Nora's house in 2019, since his mother's house was under renovation.*
- (vii) *The witness said that even after the complainant moved to Tokasa Nora's house: "We were still providing her with some things and they were providing her with her school stuff – her food to school and her school lunch.*
- (viii) *The witness totally denied all the allegations made against him by the complainant during the course of her testimony.*
- (ix) *Regarding the alleged incident which took place in the year 2016, the witness said that he did not go with the complainant to the forest. He explained that the forest is more than half a mile away from where he was living and that it would take about 25-30 minutes to reach the forest.*
- (x) *When questioned about the alleged incident which took place in 2017, while totally denying the allegation made against him, the witness said: "In 2017, I started working in Nakasi. That was in the month of January. I started in 2017".*
- (xi) *The witness said that around August 2017 he sustained an injury on his leg. The injury was sustained while he was working at Nakasi. The witness went on to explain as to how exactly the injury was caused to him. He said that as a result of the injury he became unconscious. He had regained consciousness in hospital – at the Banabhai Hospital in Makol.*
- (xii) *When asked as to which part of his leg got injured he explained: "The ball joints on my left leg got dislocated and on my right leg my toes got fractured".*
- (xiii) *From the Banabhai Hospital he had been rushed to the CWM Hospital by ambulance. He had been taken to the Emergency Room at CWM. There he had been informed that his bone had been shattered and that they will have to operate on his leg. When asked if they operated on him he answered no.*

- (xiv) Thereafter, they had applied cement casts on both his legs. The cement cast had been in place for 5-6 months. When the cement cast was on his leg he had to use a wheelchair to get along at home.
- (xv) When asked as to how long he was using the wheelchair for, the witness said: "After my cement cast was removed I was using the wheelchair to learn to walk – the wheelchair to support me (assist me) to walk. Because I did not have crutches at that time".
- (xvi) When asked again as to how long this injury lasted, the witness said: "It was until 24 December 2018. When we moved to our current house then I started to walk still using crutches".
- (xvii) The witness testified that he was able to walk on his own again only after December 2018. He said: "Then I began to walk using a walking stick".
- (xviii) The witness said that he never went to the forest during the period of August 2017 to 24 December 2018. When asked as to when he was able to go back to the forest on his own he said: "I never went back to the forest".
- (xix) When asked the question: "So from the time you got injured until you left Koroibici, you never went to the forest?" The witness answered: "We went lately because my wife wanted to show me the farm – it was when its good weather then we go".
- (xx) The witness totally denied the alleged incident which the complainant said took place outside of the house at the back of the kitchen, in 2018.
- (xxi) The witness totally denied the alleged incident which the complainant said took place in the forest, in 2019.
- (xxii) The witness also totally denied that he touched the complainant's breast in 2019.
- (xxiii) The witness said that he has 2 children from his previous marriage and 6 more children with his current wife. The complainant's mother is one of his children from his first marriage.
- (xxiv) The following questions were then asked from the witness and he answered as follows:

Q. How was your relationship with AS?

A. I love her a lot.

Q. Why do you say you love her?

A. Because her mother had passed away and she was with her grand-mother and whatever I provide to her I provide with love and whatever she asks I provide her.

Q. How do you feel about these allegations raised by AS?

A. It hurts me. The reason why it hurts me is because she is being influenced from somewhere.

Q. And even after these allegations by AS, how do you feel about her?

A. I still love her and treat her as a daughter.

(xxv) The accused was cross examined at length by the prosecution. Several suggestions were also put to him regarding the prosecution's version of the events.

(xxvi) It was suggested to the witness in cross-examination that he was lying when he testified in Court that he was using a wheelchair and crutches for more than one year for the injury on his left ankle, which had a cast for only 5-6 months and for which no surgery had been done. The witness denied this suggestion.

(xxvii) The witness agreed that the farm he spoke about in evidence in chief was in the forest. He also agreed that this farm is where his family gets food from – some root crops. However, he said that he doesn't go to this farm a lot because he is working and because his children are doing the farming.

(xxviii) When suggested to him that he used to go to that farm to do farming in the year 2016, the witness said that he was on a fishing vessel. He said he used to go out to sea for 3-4 weeks at a time. When questioned further he said that the fishing vessel did not have a name, but it belongs to the Indian people in that side – meaning in Nakelo, Wainibokasi.

(xxix) The witness agreed that he supported the complainant financially after her mother had passed away in 2016.

(xxx) The following questions were then asked from the witness in cross-examination and he answered as follows:

Q. And you said you love her (the complainant) as your grand-child?

A. Yes we love her very much.

Q. And you heard everything she informed Court in the past few days in her evidence?

A. Yes.

Q. And you agree that you also had a good relationship with her?

A. Yes the relationship was good.

Q. I put it to you that why then would AS inform the Court about these allegations against you?

A. Because the place she is staying now is where we don't have a good relationship.

Q. What do you mean by that?

A. We don't have a good relationship with Bu Nora (my sister) where she is staying now.

Q. What has that got to do with AS?

A. Because something when AS came home I did not like and I slapped her back and I sent her away because I don't like where she is staying now.

Q. I put it to you that AS has informed the Court of these allegations against you because they are true and she has no reason to otherwise make up these allegations.

A. It is a lie. I do not agree to it, it is not true.

Q. And why would she lie about this?

A. Only herself and the people who came with her would know – people who came to give evidence.

Q. You agree that AS has no reason whatsoever to make up these allegations?

A. No.

Analysis

- [36] As stated before, the prosecution, in support of their case, called the complainant (AS), her grandaunt, Tokasa Nora, the complainant's aunt, Mereseini Rokowati and Medical Officer, Dr. Losana Burua. The prosecution also tendered the Birth Certificate of the complainant and the Medical Examination Report of the complainant, as Prosecution Exhibits PE1 and PE2 respectively.
- [37] The accused testified on his own behalf.
- [38] In this case, Dr. Elvira Ongbit is the Medical Officer who had examined and prepared the Medical Examination Report of the complainant, which has been tendered to Court as Prosecution Exhibit PE2. The examination had been conducted at the Medical Services Pacific (MSP) Clinic in Suva. However, since Dr. Ongbit is said to be overseas and is no longer serving at the MSP, Court permitted the prosecution to lead the evidence of Dr. Losana Burua. This was done in terms of Section 133 (5) of the Criminal Procedure Act. The Section provides: "The contents of any report which the prosecution intends to give as evidence under this section and about which notice has been given under sub-section (2), may be referred to and commented upon by any other expert called as a witness in any criminal trial."
- [39] As I have stated earlier, the burden of proving each ingredient of every 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 the elements of all six charges beyond reasonable doubt.

- [40] As I have again 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.
- [41] Based on the said agreed facts it is confirmed that the accused is related to the complainant as he is her maternal grand-father and also that he financially supported the complainant after her mother had passed away in 2016.
- [42] It has been agreed that the alleged incidents occurred at Koroibici Settlement, Lokia, Nausori. Therefore, the third element of each count, which is the place where the alleged offending took place, is proved beyond reasonable doubt.
- [43] It is also been agreed that the complainant was 9 years old in 2016. Therefore, it is proved beyond reasonable doubt that at the time the complainant said the alleged incidents took place she was under the age of 13 years (In any event, this is also confirmed as per the birth certificate tendered to Court as Prosecution Exhibit PE1, where the complainant's date of birth is shown as 11 June 2007). This is the fifth element the prosecution has to prove in respect of the five Rape charges.
- [44] However, it is the duty of the prosecution to prove the remaining elements of the six charges beyond reasonable doubt. That would be, in respect of Counts 1-4, that the accused, during the specified time period, penetrated the vagina of the complainant AS, with his penis. In respect of Count 6, that the accused, on 30 October 2019, penetrated the anus of the complainant AS, with his penis. In respect of Count 5, that the accused, during the specified time period, unlawfully and indecently assaulted AS, the complainant, by touching her breasts.
- [45] I have summarized the evidence of all the witnesses led during the trial. At the time she testified in Court the complainant was 13 years of age. She testified to the incidents which commenced in 2016. In her own words when she was 9 years old and in Class 4. She further testified to what the accused did to her in the years 2017, 2018 and 2019 (up until 29 October 2019).

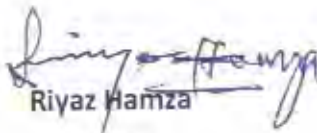
- [46] Let me first explain the reason I found the accused not guilty and acquitted him of Count 6. As could be observed Count 6 makes reference to a specific date of offence-30 October 2019. Thus the prosecution must establish beyond reasonable doubt that the incident referred to in Count 6 took place on or about the said day.
- [47] With regard to the incident alleged in Count 6, the complainant testified that the incident took place in 2019. She did not specify a particular date on which the incident took place. Mereseini Rokowati, also known as Bu Roko or Bu Roks, was an eye witness to the said incident. However even she referred only to the year the incident took place, namely 2019, but did not refer to a specific date on which the incident took place.
- [48] The complainant had made a statement to the police on 7 November 2019. The said Mereseini had made a statement to the police on 20 November 2019. The prosecution failed to elicit in evidence the date of incident, at least in relation to the said statements made to the police. The said two witnesses could have been asked as to when the said incident took place, at least in reference to the number of days or weeks prior to their statements being made to the police. However, the prosecution failed to do so.
- [49] Witness Tokasa Nora testified that on 31 October 2019, she got to know from the complainant that the accused had done bad things to her. However, the said Tokasa Nora had not inquired from the complainant as to when exactly these bad things had been done to her.
- [50] In her evidence in chief the Medical Officer Dr. Losana Burua testified that the injury on the complainant's anus could have taken place within hours to 4-6 weeks of the date of examination, which was 6 November 2019. However, in cross-examination she said: *"The injury on the anus could have taken place within a few hours to 4-6 days. Since it was a fresh injury it could be within 6 days"*. This position was not clarified by the State in re-examination.
- [51] In the circumstances, the only alternative available to the prosecution was to have made an application to Court to amend the date of offending in Count 6 to read as 1 January 2019 to 31 October 2019. However, the prosecution made no such application.
- [52] Therefore, this Court had no alternative but to find the accused not guilty and acquit him of the said charge.

- [53] The accused has testified in Court and totally denies all the charges against him. The accused, inter-alia, takes up the position that in the year 2016 he was working on a fishing vessel. In August 2017 he had sustained an injury on his leg, which he said was cured only around 24 December 2018. However, prosecution witness Tokasa Nora testified and said that the accused did not have the injury on his leg for more than 4-5 months.
- [54] The accused also alleges that these allegations were made against him by the complainant due to his sister Tokasa Nora not having a good relationship with him. However, this position was never put by the defence to either the complainant or to Tokasa Nora during the course of their evidence.
- [55] Therefore, in my opinion, the defence version cannot be accepted as truthful and credible.
- [56] The complainant testified that she is attending the Nausori Special School for the past one year. Therefore, it is clear that she is a child with special needs. However, she withstood the rigorous cross examination by the defence. It is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable.
- [57] It is true that there were certain inconsistencies in her evidence, which were highlighted by the defence, specifically with regard to her police statement. But it is the opinion of this Court that those inconsistencies or contradictions were not significant or material, considering the totality of the evidence adduced in the case.
- [58] In relation to the counts of Rape, the complainant testified that the accused put his male private part in her mimi. When asked to explain what was meant by the male private part she explained that it was the place from which the accused pees or urinates. When asked to explain as to what she mean by her mimi, she explained that it was the part from which she pees or urinates.
- [59] During the closing address Counsel for Defence submitted to Court that a female urinates from her urethra and not from her vagina. She submitted further that the accused has been charged for penetrating the vagina of the complainant with his penis. As such, that the prosecution has not charged the accused for penetrating the complainant's vulva with

his penis, instead of penetrating her vagina with his penis. The Learned Counsel submitted that the urethra and the vagina are all part of the vulva.

- [60] However, this Court cannot accept this position taken up by the defence. I am satisfied that what the complainant meant by her mimi, which she explained as the place from which she urinates, is clearly a reference to her vagina. Similarly, I am satisfied that what the complainant meant by the male private part of the accused, which she explained as the place from which he urinates, is a reference to the accused's penis.
- [61] Considering the nature of all the evidence before this Court, 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 charges of Rape with which the accused is charged in Counts 1-4 and the charge of Sexual Assault, with which the accused is charged in Count 5.
- [62] In the circumstances, I find the accused guilty of the charges of Rape with which he is charged in Counts 1-4. I also find the accused guilty of the charge of Sexual Assault, with which he is charged in Count 5.
- [63] Accordingly, I convict the accused of the charges of Rape, with which he is charged in Counts 1-4 and the charge of Sexual Assault, with which he is charged in Count 5.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 16th Day of March 2021

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