

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 12 of 2021

STATE

vs.

ISIMELI CAGICA BALEIONO

Counsel: Ms. K. Semisi for the State
Mr. T. Varinava for the Accused

Date of Hearing: 09th to 10th August 2022

Date of Closing Submission: 11th August 2022

Date of Judgment: 12th August 2022

JUDGMENT

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 21st January 2021:

COUNT ONE

Statement of Offence

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

Particulars of Offence

ISIMELI CAGICA BALEIONO between 14th July, 2020 to 6 November, 2020 at Lakeba in the Eastern Division, penetrated the vulva of **M.B** a child under the age of

13 years, with his tongue.

COUNT TWO

Statement of Offence

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

Particulars of Offence

ISIMELI CAGICA BALEIONO between 14 July, 2020 to 6 November, 2020 at Lakeba in the Eastern Division, had carnal knowledge of **M.B** a child under the age of 13 years.

COUNT THREE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

ISIMELI CAGICA BALEIONO on 25 November, 2020 at Lakeba in the Eastern Division, unlawfully and indecently assaulted **M.B** a child under the age of 13 years, by touching her buttocks.

2. The trial commenced on 09 August 2022 upon reading and explaining the charges the accused pleaded not guilty to all the counts.

3. The prosecution case was closed with the evidence of M.B, her mother Kalolaini Raga and Dr. Losana Burua. As it appeared to this court that there was prima facie evidence of the charges, the defence was called for and the rights of the accused were explained. However, the accused opted to remain silent and did not call any witnesses ether. This court heard the closing submissions. Accordingly, I will now endeavor to pronounce my judgement.

Ingredients of the offences

4. For the accused to be found guilty of the representative rape count No. 1 of the present case based on sections 2(b) and (3) of Section 207 that in addition to the date and place stated in the count the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused Isimeli Cagica Baleiono
 - (ii) penetrated the complainant's vulva with his tongue,
 - (iii) complainant is less than 13 years of age'

As M.B was under 13 years of age consent is not an issue. The slightest penetration of the complainant's vulva by the accused's tongue is sufficient to satisfy penetration.

5. For the accused to be found guilty of the representative rape count 2 in the present case based on sub sections 2(a) and (3) of Section 207 that in addition to the date and the place stated in the in the particulars of the offence the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused Isimeli Cagica Baleiono,
 - (ii) had carnal knowledge with or of M.B,
 - (iii) That M.B is less than 13 years of age.

As M.B was under 13 years of age consent is not an issue. In the context of this case, 'carnal knowledge' is an act of penetration of the vulva or vagina of the complainant with the penis of the accused. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act.

6. For the accused to be found guilty of count No. 3 that of "sexual assault" under section 210 (1)(a) of the Crimes Act, the prosecution must prove beyond reasonable doubt, that the accused Isimeli Cagica Baleiono himself did on the date and place specified in the charge, unlawfully and indecently assault M.B as described in the charge.
7. Sexual assault is an aggravated form of indecent assault. The prosecution must prove the above elements against the accused beyond reasonable doubt. "Assault" is to apply unlawful force to the person of another without his or her consent. The "assault" must be considered

“indecent” by right thinking members of society. The test is basically objective.

8. The ingredients of Sexual assault under the 1st limb of section 210 and indecent assault as defined under section 212 of the crimes Act are the same except for the distinction in the titles of the respective sections. It appears that sexual assault is an aggravated form of indecent assault as it carries a higher sentence. Thus, considering the use of the word ‘*sexual*’ in the title of section 210, I am of the view that, sexual assault should necessarily be involuntary contact of a ‘sexual’ nature that occurs through the Accused's use of force, coercion or the victim's incapacitation.

Burden of Proof

9. The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence. The prosecution must prove the accused’s guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the Accused’s guilt, or if there be any hesitation in my mind on any of the ingredient or on the of evidence led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The accused has a right to remain silent and no adverse inference can be drawn if the Accused remains silent.

10. Admitted Facts

The following facts are admitted in this case.

- a. *The complainant is one M.B, 12 year old student of Udu Village, Totoya in Lau.*
- b. *Isimeli Cagica Baleiono is a 33 year old male of Udu Village, Totoya in Lau.*
- c. *The complainant and Isimeli Cagica Baleiono are related.*
- d. *The complainant is Isimeli Cagica Baleiono’s step-daughter.*
- e. *The complainant and Isimeli Cagica Baleiono are known to each other and there is no dispute in relation to the identification of Isimeli Cagica Baleiono.*
- f. *Between the 14th July 2020 to the 25th November 2020, the complainant and the accused lived together in the same household at Udu Vilage in Totoya in Lau.*
- g. *During the month of October 2020, the accused visited his parents at Valedina Settlement in Lami and then he returned at Udu Village in Totoya in Lau at the end of the month of October 2020.*
- h. *Isimeli Cagica Baleiono raised the complainant from a young age.*
- i. *Isimeli Cagica Baleiono and the complainant’s mother have two children from their marriage however they later separated and divorced.*

- j. *From July 2020, the complainant's mother and Isimeli Cagica Baleiono began a defacto relationship and began to live together with the children.*

The Case for the Prosecution

11. The victim M.B, her mother Kalolaini Raga, and Doctor Losana Bura gave evidence on behalf of the prosecution.

According to **M.B** in 2020 she was living in Udu village in Totoya with her mother and 3 siblings in the house of the accused Isimeli. Accused is her step-father. She had been living with him since she was 6 years old. They have been living in Nadi and has shifted to Udu village on the 8th of July 2020 to their own house in Isimeli' village. The house they lived in had three rooms one of which was the kitchen other used as a bedroom, other the sitting room. The family used to sleep on mattresses sometimes in the room and also in the sitting area. Her family had been growing vegetables in a land which was about a 45 minute walk away from the house. Her date of birth is 15th August 2008. When she gave evidence she was about 14 years.

12. On the 14th of July, 2020 she had gone to sleep in the bedroom with her older brother and a younger sister. Her mother and other siblings with the accused have been in the other room. Suddenly she had felt someone showing her arm and when she woke up she had seen that it was the accused her step-father. There had been a solar light in the hall and the light has fallen through the room. When she woke up the accused had told her "*I want to climb*". She had not understood what he meant. So she had asked what that is. The accused tol, "*that's what mummies and daddies do at night*". She along with her other two siblings were sleeping on the mattress and the accused had been standing closed to her feet. Then the accused had removed her pants and panty and started to touch her vagina. Though she had not liked it and told him not to do so he had continued and even held her mouth at one stage and then she had felt him putting his tongue into her vagina and licking. Thereafter she had felt pain in her vagina and that was when the accused had put his penis into her vagina. After having so done for about 3 minutes, had got up put her clothes back on. Accused has also sucked her breast and kissed her mouth. She had been kicking her little sister but she had not woken up. The accused had also threaten and told her that he will kill her and her mum if this was told to anybody. She had gone back to sleep. She says the pain in the vagina continued during the following two day.

13. About 2 nights thereafter the same thing had happened again. The accused had come and wanted to have sex with her. When she refused accused had responded that he *will cut her neck and her mother's neck and will crush it*. Thereafter, he had done the same things that he did on the previous day (victim had explained in details of the acts done). On this day the accused had come only in the pair of shorts. On the first day he had a t-shirt on. This sexual activity of this nature had been going on during the period 14th of July to the 06th of November. According to her the insertion of his penis into her vagina and other acts were committed by the accused on several occasions during this period.

14. Then apart from in the house the accused had inserted his penis into her vagina when they were at the plantation. On Saturdays the entire family used to go to the land and plantation and they pick coconuts and collect copra. When she was collecting coconuts her mother had been a short distance away. The accused had been nearby he had got her to lie down, taken her pants and panty off then inserted his penis into her vagina and had sexual intercourse for about 5 minutes. As there were growing coconut trees, if she was standing she could see her mum but otherwise could not see. At the plantation also this had been happening occasionally. The on the 6th November, 2020 the family had been sleeping in the living area in the night. The accused had woken up M.B and told that he wants to have sex with her. She had been tired, she had got up and then gone near her mother and sat down. The accused had done something to her calf muscle which she does not know exactly what. However, due to the sudden pain she had happen to kick her mother who had then woken up. M.B. had closed her eyes and gone back to sleep. However, after sometime the accused had come to her once again removed her pants and panty and inserted his penis into her vagina and had sexual intercourse. After that as she was tried and angry she had been crying whilst seated on the bed. Then her mother had woken up seeing her crying and asked why. She had lied to her that she had wet her bed. Then her mother had questioned the accused and there had been some talk between Isimeli and her mother. Mother had asked him what he has done to M.B. The accused had responded by saying "*are you mad, I didn't do anything*". Her mother had taken her to another room and asked her when she had only mentioned some things had happened that night. But she had not told everything. Then the accused had come into the room and sent her out and spoken to her mother. MB says that she did not tell the mother because she was afraid of the accused who had threatened her but because

her mother was questioning her she had told what happened that night only.

15. Then on 25th November, she had been at home sleeping with her siblings when her mother was in the kitchen cooking something in the stove. The accused had asked her to sweep the house which she had done and then her mother asked her to go to the kitchen and check in the stove she had gone there. As this time her mother was out of the house. The accused had come into the kitchen and told her that she should not wear a panty at night as he wanted to have sex with her. He had lifted her skirt and touched her bum which she explains to be her buttocks. As this was happening her mother had suddenly walked in and seen this. She had asked what was happening and told MB to run out. She had run and the mother had run with her. She had taken her little brother when she ran. They ended up at the beach and remained there when the accused had come to that place. The mother had talked to Isimeli and apologized to him and agreed to go back home. However, when they walked up the accused had been walking a little away from them at which moment her mother had told her to run into Ms. Ana's house. It has been somewhat dark M.B, her mother and her brother had run to Ms. Ana's house being there for some time when the accused was heard talking to Ms. Ana. Her mother then spoken to accused and told her that they should go back home as the lives of other two children at home will be in danger. So all of them had returned home.
16. The following day children have all but one gone to school. After a while the mother had come to school spoken to the teacher, taken M.B and her two siblings with the small sibling and gone to the beach. The mother had a small bag with the few clothes. The mother had spoken to three boat owners of them two has refused but the third agreed to take them to Ketei. Mother had told this boatman that her small child is very sick. They have gone to her mother's uncle and stayed there for 2 to 3 days and then got the boat to Suva and then gone to the Totogo police and made the complaint.
17. She says that she was examined by a doctor and there was counseling also. After she was assured at counseling that whatever happened was not due to her fault and being assured she narrated everything that happened to her. She pointed and identified the accused in the court. In cross-examination she admitted that the accused did look after her since she was 6 years old.

That she studied in Udu Village School and had friends and teachers whom she could have spoken to. When she was asked as to why she did not tell any friend in school or teacher she said she was worried because children will start talking about this and it will spread in the village.

18. In cross-examination the following omissions were elicited. That she had not told the police of; the threat made by the Accused after the incident on 8/7/2020; accused dressing her up after the act of 6th November; not told about going to Ana's house on the 25th and the request made to several boat owners.
19. She admitted that the accused bought her eye pencil and a lipstick. She admits that Isimeli had her mother had arguments regularly but she did not know the reasons. She admitted that her mother was unaware as to what was happening between of her and the accused. The fact that she had not mentioned about her mother questioning her on 6/11/2020 being not mentioned in the statement was also raised as an omission. It was suggested to her that all what she said did not happen and everything she told was made-up by her mother, the witness denied these suggestions.

PW2 Kalolaini Raga

20. She is MB's mother and the accused was her defacto partner and that she had been married to another had 2 kids the victim and the elder boy and after divorcing him she had started defacto relationship with the accused. She had 2 children from him, the younger two children. She appears to have been separated from him for some time but due to the Covid-19 situation she had lost her job at the hotel where she was working. She then has got together with the accused and gone to Udu, Totoya, Lau. She says that as she had no way of living she took the children and went with accused with to this island village where he had a plot of land and a house. The land was about 2.5 kilometers away from the house. She says the children were admitted to the school in the village and initially though it was difficult with the plantations growing life was comfortable. They have owned quite a plot of land with coconut trees and vegetable plantations. Her husband used to go to the plantation during the week days and come back in the evenings. Then on Saturdays the entire family to the plantation.

21. On the 6th November, 2020 she narrated the incident where she suddenly woke up in the night due to a kick. She had seen the accused peeping from the room. She had gone into the room and seen the blanket on the floor and there was a bible also. She has felt suspicious about the accused and suspected that he was waiting for his former girlfriend who was living in the village. He had started reading the bible and asked her to leave. She had returned and fallen asleep and after a short while she heard the girl crying woken up and asked her why. When MB had told that she had wet the bed, she had been not convinced because M.B had never wet the bed before. She was shown a patch on the bed sheet which she smelt and realized it was seamen. Then questioned MB who did not come out with much. However, after this incident the accused had been denying and she had apologized with him however she continued to be suspicious.
22. The following few days she tried to be normal. On the 25th of November she had asked M.B to look after the little boy however, the little boy was found roaming about and MB was putting make-up and lipstick she had wacked her with a stick and asked her if she was hiding anything because she was suspicions, MB had told in Itaukei “*mum I don't want us to die*”. She had reassured and asked her when she had told that the accused put ‘*his balls into her passa*’. The witness has understood this to mean putting the penis into the vagina. The accused had seen her questioning the girl and asked why she was questioning. Kalolaini has asked the accused what you have done to MB. Accused was angry and had denied and said he has not done anything. After this incident there has been unpleasantness and she had been thinking of a way to escape and get to a police station.
23. On the 25th afternoon she has sent M.B to the kitchen to check on some cooking and she had been out of the house with other children. As M.B was taking some time and the accused was in the house she had felt suspicious and gone in to the kitchen and seen M.B with the skirt up and the accused behind her. Both were shocked. Thereafter she had asked M.B to run and she too had ran with one other child to the beach to escape, but with night fall the accused had come there and told them to come home. On their return M.B and the witness into a nearby house of Ms. Ana. The accused had come there later on and taken them back home. After they went home the Accused had taken the witness in to the kitchen and told her that if she try to escape she or a kid will be killed and had shown the chopper knife which was on the table.

24. She had planned to escape the following day and packed her few clothes and told the children that she will come for them at school. During these two weeks had not gone to the plantation but remained home. On the 26th the children except the youngest had gone to school and the witness had tried to be normal and was trying to prepare a meal. She had got the accused to go the plantation to get some eggplant. When the accused left she had taken the youngest the child and escaped to the school picked-up other children and hired a fiber glass boat and gone to Ketei and where the an uncle of her lived. She had informed the Moala Police which was in another island, they have instructed her remain in the island until they send some officers. She had remained for 2 days until the ship for the main Island (to Suva) arrived.
25. In the meantime the accused had come to this island with 2 other but as the village headman of Ketei did not allow him and Isimeli had to leave. The boat has arrived in 2 days' time with some police officers and she had managed to get all her children and come to Suva. Her father-in-law has provided accommodation for that night and the following day had gone to Totogo Police and given their statement and MB had been examined by the Doctor and also provided with counselling. She said that the Accused was attested in December and she with her children then returned to Udu as she had no means to live and was there for some time. When she went she had seen a letter written by the Accused seeking forgiveness for what he has done to M.B.
26. In cross examination she admitted that the accused ex-girlfriend was in Udu and she was suspicious of him having a relationship with her. She said she suspected that something was there between the accused and MB as she noticed unusual remarks being made by accused. She admitted that she was formally in the police. When asked why she did not inform Ana the neighbor she said she had no confidence and she wanted to inform the police. The following omissions were raised that she had not told in the statement that Isimeli wanted to have sex constantly and regularly and wanted her to submit to him and also the fact that some fiber glass boat owners refused to take her.
27. Finally it was suggested that she made these false allegations and got MB to come out with it. It was also suggested that she made these stories because she was suspicious. These suggestions were denied.

28. **PW 3, Doctor Losana Bura**, narrated her qualifications and experience. She has 24 years' experience as a general practitioner and her MBBS qualification. The defence did not dispute her qualification, experience and expertise. In view of her qualifications and experience I accept her as an expert witness. She had examined MB on 1st December 2020. The history has been recorded and on the physical examination as it was a matter of sexual abuse she had made genital examination. She had observed that the hymen was not intact it has three old healed tears at 3, 6, 10 o'clock positions. She has not observed any fresh I injuries and hymenal tears according to her are old which meant they are over 6 days old. She explained that within about 6 days these injuries heal. As for the tears of the hymen her opinion was that this can be caused by blunt force most probably by a male erect penis. The tears on the hymen she described as been deep lacerations and is possible by forceful penetration of the hymen by an erect male penis. The child had been sent for counselling upon the medical examination. Child's mother had been present and consented for the examination.
29. As for the case history she had obtained from the girl. She had briefly told that her step-father started sexually abusing at their house in Udu, Totoya, Lau from July 2020 to November 2020. And that he used to threaten her that he will kill her if she told on him. I would consider the history only for the purpose of ascertaining the consistency of the evidence of the victim and for no other purpose. The doctor's evidence was unchallenged and she had merely given evidence on her professional duty performed and no more. This court accepts her evidence as truthful and credible.

Evaluation

30. Both these witnesses gave evidence before me and I observe that they narrated extremely complicated series of events running into several weeks and months. I did not observe any inconsistency or contradiction either *per se* or *inter se*. considering the age of the girl in the normal course of the event it is not possible to narrate such a complicated story unless she had actually experienced it. M.B was very prompt and precise in her evidence. When answering I observed that she was recalling reliving and narrating an experience which is a hallmark of a truthful witness.

31. Similarly, her mother Kalolaini narrated these events in greater detail than the daughter and as she went to recall painful events and incidents, she was visibly emotional which was spontaneous and natural. Both these witnesses were not showing any undue malice towards the accused especially in the cross examination. Therefore, I observe that their demeanour and deportment of both these witnesses was unusually good and was consistent with that of a truthful witness.

Omissions

32. As for the omissions the girl M.B has not mentioned the threat made to her in respect of the first incident. However, she had narrated several other incidents and on subsequent occasions appear to have mentioned about the threat as no omissions was raised in respect of the subsequent threats made by the accused. Therefore it is not that the threat was totally absent in the statement but on one particular occasion it has not been said. This is expected and nothing unusual when she narrates a series of events and several threats.
33. As to the other omission of not mentioning about dressing up after that failure to mention going to Ana's house and the request made to several boat owners. I am of the view that there are additional information and incidents which she could have missed whilst making a statement under these circumstances. Therefore I am of the view that these omissions do not affect the credibility of MB in anyway.
34. As regards the omissions elicited from the mother they are also not in relation to any substantive matter but some additional information. When statements are made to the police one cannot expect all details which are of peripheral issues to be included. Thus these omissions are insignificant. Therefore, the evidence of both these witnesses is consistent inter se and per se.

Belated complaint or delay

35. M.B has been sexually abused for a period of almost 4 months from July 2022. However, she had not disclosed this to anybody on her own until November 2020. When her mother got suspicious and made enquiries she concealed and did not tell her. It was only when her mother was persisting and upon assuring her that the sexual abuse by Isimeli was told that also in a

limited manner she only told of the immediate incident.

36. I will now consider if this affects her evidence. She is a girl of tender years and was living under the control and command of the accused who was her step-father. She said that he was an extremely strict person who punishes even when their clothes are disorganized. The accused have been wielding a great degree of power and control over the family and a small child in these circumstances will find it extremely difficult to resist or go against such a person. Accused has threaten in an extreme manner especially after the first incident she was suffering with pain in her vagina and when 2 days after he demanded sex with her she refused. Then the treat was that he will cut the neck of both the mother and daughter and crush it. M.B very promptly and spontaneously in her evidence sad that she believed that he could do so because of his nature. When the mother forced her to tell and asked her what happened her response was “*mom I don't want us to die*”. This is a clear indication as to her state of mind and the fear she had been put into. In these circumstances it is extremely possible and natural for her to have suffered in silence. Thereafter, one night when she was forced to have intercourse she had been crying in bed which her mother heard and woke up. This clearly shows whatever that was happening was not to her liking and she was extremely hurt and affected but was suffering in silence. Not only that it clearly indicates that she was concealing something and crying alone in the night but was just giving vent to that frustration. Then as to why she did not tell any friend or teacher or she said in cross examination that if she had told her friends or teachers it would spread in the village and she knows how others will be talking about it.
37. Apart from this the geographical setting and the environment has greatly contributed to this fear. They have been living in a small isolated island in a remote area with a very limited population. It has been the village of the accused. All these considered together I am of the view that her non-disclosure is reasonable and the explanation is acceptable.
38. It is settled law that recent complaint is relevant to the question of consistency, or inconsistency, of the complainant's conduct, and as such is a matter that goes to her credibility and reliability as a witness. (vide *Raj V The State* 92014) FJSC 12: CAV 3 of 2014, 20 August 2014). Justice Fernando (President of the Court of Appeal of Seychelles) in *Jean-Luc Louise v state* [2021]

SCCA 72 considering the delay similar circumstances opined that,

“The matter of recent complaint only goes to the issue of credibility and consistency of the complaint....” and that, “...Delay is a typical response of sexually abused children, as a result of confusion, denial, self-blame, embarrassment, powerlessness and overt and covert threats by offenders”.

39. This is applicable to the present case too. M.B from a very young age being under care and custody of the accused in the aforesaid circumstances, would require courage and emotional strength to reveal this even to her own mother or to another especially in view of the threats to kill which she believed that he will carry out. Hence, I hold that the reasons for the delay are reasonable and acceptable to this Court. In the aforesaid circumstances I am of the view that the evidence of the M.B is truthful, reliable and creditable.

Suggestion of false allegation

40. The suggestions made both to MB and her mother is that this is a false allegation made up by the mother and narrated by MB. As a probable motive for this the defence elicited that Kalolaini was suspicious of Isimeli having something to do with his ex-girlfriend. Let me consider if this suggestion creates any doubt and if it is probable. In the normal course of event even when a child is sexually abused in these circumstances the mothers are prone to conceal it or may down-play to avoid adverse publicity and embarrassment that may be caused to the daughter.
41. Apart from that if someone wanted to make out of false allegation you would expect a simple incident to be fictitiously created. It is extremely improbable to expect a mother and a daughter of this age to sit together and draw up such a complicated series of events. Even if one assumes that it was done so they both could not have narrated the entire story without any appreciable contradiction. In this case there was no contradictions either *inter se* or *per se*. therefore, the suggestion that it is a false allegation made up by the mother is highly improbable and cannot be.

Kalolaini is An Ex-Police Woman

42. The defence raised the issue that Kalolaini was an ex-police officer that she had the connection to have informed the police even before they came to the main island. She gets to know of this

incident within the last 2 weeks before the 25th November. During this period the accused had generally remained at home even when things were getting very bad her attempts to run-away have not been successful. This is purely because of the extreme geographical isolation of their place of living and the extreme fear. It is her experience and training as a police officer that made it possible for her to escape as narrated by her. Therefore, her failure to inform the police before the 25th is reasonable and acceptable.

43. The victim has been living with the accused since she was 6 years old so when this incident took place she had been with him for almost 5 to 6 years. The sexual abuse has taken place from about July 2020. Is there any reason for him to have waited so long to abuse her? As it transpired in evidence the family had shifted to this isolated village due to Covid on 8th July, 2020. It appears that with the shifting and moving to the village the accused had the opportunity and the necessary circumstances and the security and the belief that whatever he may do will remain secret in that environment. Therefore the change of attitude and giving expression to his lustful and sexual desires he had of MB after shifting to this isolated location house is highly probable and can be.
44. On the aforesaid evaluation of the evidence of both witnesses is consistent and probable. The demeanour and deportment is consistent with that of truthful witnesses. In this circumstances I accept their evidence as truthful and reliable.

Proof of the Charges

45. There are 3 counts and counts 1 and 2 are rape and they are representative counts. Count number 3 is the sexual assault count alleging that MB's buttock was touched by the accused. As for count number 1 the penetration is the vulva with the accused's tongue. According to the victim she had been subjected to sexual intercourse starting from 14th of July, 2020 upto 6th November on several occasions. Many of those in the house whilst sleeping at night and some others at the plantation. On the 14th July 2020 she had been sleeping in the room with the younger brother and her sister. The accused has come to her and woken her up and had sexual intercourse of which the details are narrated in the summary of evidence above. According to her the accused has pulled her pants and panty down and started licking her vagina. When he was so licking she

says that she felt his tongue touching her vagina. This clearly establishes that apart from mere licking of the genital area the tongue of the accused had entered within the labia majora and minora and gone beyond the vulva and entered the vagina. This necessarily means the tongue had penetrated the vulva which is between the vaginal orifice and outer lip. If not she could not have felt something touching her vagina. This proves the element of penetration of the vulva of count number 1.

46. As for count number 2 it is canal knowledge which for the purposes of this case will be the penetration of the male penis into her vagina or vulva. As for the offence of Rape based on canal knowledge the slightest penetration would suffice. On the 14th July after the accused licked her vagina and vulva she had then felt pain in her vagina and felt and seen the accused putting his penis into her vagina. In considering this item of evidence the victim specifically mentioned that she felt great pain at the point the penis of the accused was inserted into her vagina. According to her this pain had continued on the following day as well. This item of evidence is very significant. As for her evidence they have shifted to Udu on the 8th July 2020 and within a few days on the 14th the accused for the first time has intercourse with her. In fact when the accused had told her “I want to climb” she had not understood what this meant. She had asked the accused who then told her this is what mummies and daddies do at night. Thus, it is very likely and most certainly this was the first time she was encountering an act of intercourse without doubt it is the first time by the accused. He pain in the vagina on that night as well as it continued for a day or two is very probable in view of medical evidence which shows three lacerations on the hymen. According to the doctor due to force penetration by an erect penis such lacerations can occur and in the normal cause of events when there is a tear or lacerations of the skin the victim will certainly feel the pain. As we all know an injury of this nature will be painful for a day or two. It is such a notorious fact. In this instance it is extremely probable that the accused penetrated his penis and thereby caused lacerations on her hymen. This was the reason for the immediate pain and it continuing for the next day or two. This make her evidence extremely probable and true. Further, apart from the act of penetration on the 14th she narrated several other acts of penetration thereafter by the accused. However, she did not say anything about feeling of any such pain as on the first occasion. This to my mind is extremely probable because with the initial forceful penetration her hymen had ruptured and any subsequent

penetration would not cause any rapture. Therefore, the victim's evidence is extremely probable and true, and on this evidence the penetration of her vulva and vagina is established and thereby canal knowledge of count number 2 is proved.

47. It is common ground and not in dispute that the victim was born on the 15th August 2008 which is proved by her birth certificate PE1. This proves that she was below the age of 13 years as at this date. The consent is not an issue and not relevant.
48. As for the identity of the Accused, these incidents have taken place in the night and in a room. The victim says that there was a solar light in the living area which had fallen into the room. That she had thus seen and identified the accused as the person who committed these acts. Apart from this by this time she had known and had been living with the accused in the same house for over 5 years. The accused had spoken to her and uttered certain things and to commit sexual intercourse the accused should be at close proximity. In these circumstances the victim did have every opportunity to clearly see and identify the accused and there is no doubt whatsoever on the identity of the Accused.
49. Apart from this incident she narrates in her evidence that within two days the accused when she was sleeping once again in a similar manner woken her up removed her clothes, licked her vagina and inserted his penis into her vagina. He has also sucked her breast and kissed her lips. On this occasion MB says that she refused when he asked at the outset but he threatened her that he will cut the neck of MB and her mother and will crush it. This had been just two days after the first incident. She says that her vaginal pain was continuing. When the accused woke her and he wants to have sex she had refused. This is extremely probable especially as she was in some pain after the first incident. This sequence of events clearly is extremely probable and makes MB's evidence credible. Then between this day and November this has happened many times within the house then this act of penetration has taken place in the plantation on Saturdays. This evidence clearly proves the representative counts of rape, counts number 1 and 2.
50. Let's consider count number 3 that of sexual assault. On the 25th November whilst she was in the kitchen the accused had come there and the Accused had then pulled her skirt up and touched her bum (buttocks) and told her that she should not wear panties in the night so he could have

sex with her. At this time her mother and her siblings were out of the house but in the vicinity. However, he mother had walked in and seeing the accused behind MB holding her with her skirt up, this is confirmed by the mother's evidence as well. This act of touching the buttocks by her step-father is certainly not decent and is indecent by any standard. Considering the utterance he made of his desire to have sex with her makes it obvious that this was indecent. The victim MB was virtually his daughter and she had certainly not liked it. This clearly brings this act within the meaning of indecent assault and certainly it is of a sexual nature. This proves the ingredients of count number 3.

Conclusion

51. The accused did not give evidence and remained silence. It is his right to do so and he remaining silent cannot be the reason for any adverse inference or comment. This will in no way prove the prosecution case or the charges. Prosecution should prove all ingredients beyond reasonable doubt by its own evidence. As evaluated above on the evidence of the victim and her mother the ingredients to prove the three counts is available. I would now consider it by any of the suggestions put forward by the defence or otherwise if there be any cause for any doubt on the prosecution case. The defence position as suggested is that the mother Kalolaini Raga has made up a false story because of her suspicion that the accused was continuing with a relationship with his ex-girlfriend. I have considered this in detail already and decided that this is improbable and it cannot be thus it cannot create any doubt.

52. I would once again consider the overall probability of the prosecution version. It is common ground that the victim since 6 years was living with the accused in the same house. She had been so living with the accused for atleast from 2014. For 6 years until the 14th of July 2022 nothing had happened. Then could things change suddenly on the 14th of July, 2020? As I have considered above they were living in Nadi until the 8th of July, 2020 on which day the family shifted to Udu. Within 6 days of arriving in Udu the accused had started to sexually abuse MB. The change of her residence and the circumstances to my mind has a great bearing on this issue that is geographically Udu is an isolated village in a distant island from the main city. The mother Kalolaini Raga has lost her job at a hotel and the family was compelled to shift to Udu. Thus, the mother was financially depended on the Accused. This was the village of the Accused.

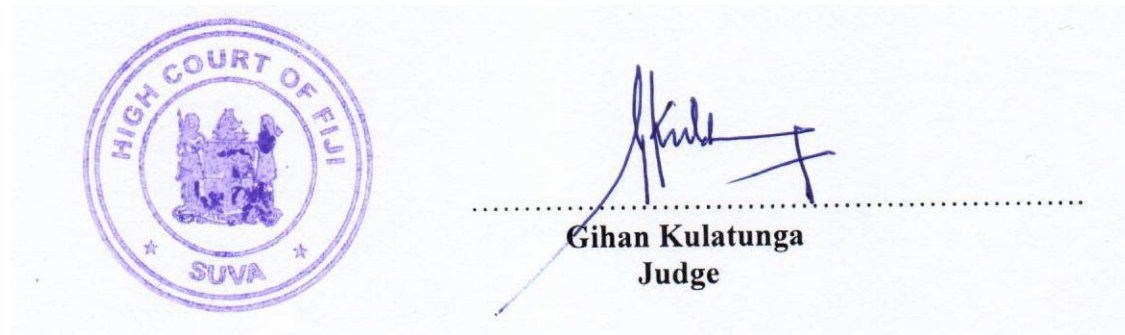
There is no police station within that Island. MB was the child from Kalolaini's previous marriage. These circumstances certainly was conducive and was encouraging for the Accused to pursue with satisfying his perverted sexual desires from MB who was by then a young girl of around 12 years. The prosecution version becomes extremely probable in view of these circumstances.

Conduct of the Accused

53. The evidence establishes that the accused was increasingly becoming violent and aggressive when the mother was questioning and finding out of the abuse. So much so, the Accused threatened the mother with that if she ever try to run-away this threat was made using a chopper. The last two weeks when this issue was gradually coming to light the accused had remained at home without going to the plantation. This proves that the Accused was of one mind to pursue his sexual abuse of MB. To this end he had taken advantage of the isolated geographical setting of their house.

54. The defence elicited that Kalolaini Raga was as ex-police officer, this coupled with the fact of the false allegation was of concern to me. I have considered and ruled out that this certainly is not and cannot be a false allegation. The only aspect to be considered is why could not Kalolaini have by some means inform the police or any other between the 16th and 25th of November if infact she found out about this. She did try to run-away on the 16th but was not successful the Accused came to the beach and also to Ana's house and she was brought back with MB. She had three other siblings who were younger to MB. The utterances of the Accused did convince Kalolaini that harm can come about to others if Kalolaini runs away. This was the specific threat made on the night of the 25th. Further, she was in alien land in the territory of the Accused so to speak, isolated and away from the authorities. She was financially weak and dependent on the Accused. Therefore, not informing anyone between 16th and 25th of November is extremely probable. As for she being an ex-police officer to my mind it is her police background that enable her to successfully escape in this manner with all the children and bring this to the notice of the police. If not for her tact and intelligence this offending would never have been exposed. Therefore the said matters raised and suggested by the defence has not caused any doubt on the prosecution case.

55. Accordingly, I hold that the prosecution has proved all the charges beyond reasonable doubt. Accordingly, I find Accused guilty of the representative Count No. 1 of Rape, representative Count No. 2 of Rape and the Sexual Assault Count No. 3, separately and the Accused is hereby convicted of the said Counts No. 1, 2, and 3 separately.



At Suva

12th August 2022

Solicitors

Office of the Director of Public Prosecutions for the State.
Legal Aid Commission for the Accused