

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 16 of 2022

STATE

vs.

IOSEFO KALAIKREKETI

Counsel: Ms. A. Vavadakua for the State
Ms. N. Ali for the Accused

Date of Hearing: 23rd to 25th August 2022

Date of Written submission: 02nd September 2022

Date of Judgment: 08th September 2022

JUDGMENT

(The name of the victim is suppressed she will be referred to as "N.W")

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 8th February 2022:

COUNT ONE

Statement of Offence

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

Particulars of Offence

IOSEFO KALAIKREKETI on 12th day of December 2021, at Caubati, in the Central Division, had carnal knowledge of **N.W**, a child under the age of 13 years.

2. The trial commenced on 23rd August 2022 upon reading and explaining the charge the accused pleaded not guilty to all the counts.
3. The prosecution led the evidence of N.W, her sister Esther Diana Rokobui and their aunt Kalisi Ravawa Vatuwava. As it appeared to this court that there was prima facie evidence of the charge, the defence was called for and the rights of the accused were explained. The accused opted to give evidence and also called his grandmother Salome as a witness. Both the prosecution and the defence tendered written submissions. Accordingly, I will now endeavor to pronounce my judgement.

Ingredients of the offence

4. Section 207 (2) (a) of the Crimes Act 2009, defines the offence of Rape as follows: a person rapes another person if the person has carnal knowledge with or of the other person, without the other person's consent however as it is admitted that "N.W" was less than 13 years of age, consent is not an issue. Carnal knowledge includes sodomy [vide-Section 206(5) of the Crimes Act]. Thus, 'carnal knowledge' is an act of penetration of the female genitalia or the anus of a victim with the penis of the accused. The slightest penetration of the female genitalia or the anus is sufficient to prove the element of penetration [vide- Section 206(4) of the Crimes Act]. In the context of this case, 'carnal knowledge' is the act of penetration of the anus of the complainant with the penis of the accused.
5. Thus, for the accused to be found guilty of the rape count in the present case based on sub sections 2(a) and (3) of Section 207 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 Iosefo Kalaidreketi,
 - (ii) had carnal knowledge with or of N.W,
 - (iii) That N.W is less than 13 years of age.

6. The accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rest 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 ingredients or on the of evidence or led by the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. As the Accused has given evidence in this case if this court accepts his evidence or is unable to reject or accept his evidence then too the accused is entitled to a finding in his favour.

Admitted Facts

7. The following facts are admitted in this case;
 1. *THAT* the person charged in this case is Iosefo Kalaidreketi who was 20 years old at the time of the alleged offending.
 2. *THAT* Iosefo is also known by the name "Sepo".
 3. *THAT* the complainant in this matter is N.W.L [hereinafter referred to as "N.W"] who was 7 years old at the time of alleged offending.
 4. *THAT* Iosefo's mother is the older sibling of N.W's father.
 5. *THAT* on the 11th of December 2021 at night, Iosefo had gone to N.W's house.
 6. *THAT* when Iosefo arrived at his grandparents' place [in Caubati] that night, as mentioned in para. 5 above, his grandmother and N.W's (maternal) grandmother were in the sitting room with N.W's oldest sister.
 7. *THAT* the next day, 12th of December 2021, there was a birthday celebration held at the house where N.W lived [in Caubati]
 8. *THAT* N.W's older sister [12 years at time of the alleged offending] is Esther Diana Rokobiu and she [Esther Diana Rokobiu] lived with N.W, at her grandparents' house in Caubati on the 11th and the 12th day of December 2021.
 9. *THAT* N.W's mother was away in Lautoka on the 11th and the 12th day of December 2021 but their father was living with them.
 10. *THAT* Iosefo's house is close to the house that N.W was staying in, in Caubati, at the time of the alleged offending.

Prosecution Evidence

8. The prosecution called the victim N.W who was just 7 years old. Her step sister Esther Diana Rokobui who herself was around 10 years and their aunt Kalisi Ravawa Vatuwava as their witnesses and close its case. The victim and her sister gave evidence

through a video link from an adjacent room of the court house as they were minor children. The defence had no objection.

9. The Prosecution commenced the trial with the evidence of **Esther Diana Rokobui**. She is the elder sister of N.W. When she gave evidence, she was in Class 7 and her sister was in class 2. On 12th of December 2021, she says that she was at her grandmother Salome's house and in the night, she saw her cousin Iosefo who is also known as Sepo coming into the house. The following morning, she had gone with N.W to another uncle's house in the neighbourhood to collect chicken when N.W told her that Sepo was touching her at night, and put his ball in her buttocks. This had happened the night before the birthday party. After hearing this Esther had told their father. Her father had not done anything about it. Their mother was in Nadi to attend a wedding. She had called her mother from her maternal grandmother Elini's phone and informed her of this incident.
10. She confirms that the previous night she was sleeping in the sitting area of the house with her grandmother Salome and N.W was sleeping in the first room near the kitchen. She also says that there were tube lights in the house. The accused is her own cousin and accused's mother is her father's elder sister. She identified the accused in court.
11. According to N.W, Iosefo is her cousin. In December 2020 she had been living at Salome's house. Esther was also living there. She was an extremely a small girl and whilst giving evidence she was relaxed and was provided with colour pencils and paper. She was drawing various pictures. In evidence-in-chief, she said that on the night before the birthday celebration, she was sleeping alone in a room of Salome's house as her mother had gone to Nadi. She says whilst sleeping she was woken up and saw her cousin Iosefo in her room. She says that Sepo *took his balls and put it in her buttocks*. She says that he took his balls and put it inside her buttock and she felt pain. She had not shouted but tried to push him away by kicking with her legs. This had happened in the room whilst she was lying on her side. She demonstrated in court how she was lying on her side when this was done. She also said that the accused came from her behind. She had been wearing her panty but the accused had pulled it down to her thighs and then put his balls. She said that the light from the kitchen fell into the room and she was

able to see and recognized the accused. After doing this, the accused had told her not to wake up anybody and then gone towards the kitchen.

12. After the accused left, she had gone to her maternal grandmother and tried to wake her up. She had told her not or else she will smack her. Then N.W had slept near her grandmother. She had not told this to anyone that night but told this to her sister Esther the following morning.
13. In cross examination she said that her father is Toni and he was out drinking that night. She admits that Salome is her grandmother and she is known as Nau. She admitted that Nau was in the living room with Esther and William. Esther had told her that Iosefo came to the house and took the charger. When she was asked Iosefo came back thereafter she had said, yes. It was suggested to her that Iosefo did not come to her room that night. She said that “yes he came into the room”. She admitted that she did not see Iosefo taking the charger and it was told to her by Esther. However, she said that when Iosefo came in to the room Esther was in the sitting room. When she was asked in cross examination if she actually saw Iosefo coming in to her room or if it was told by Esther she said that, Iosefo came in and put his balls into my buttock and specifically said that Esther did not tell that to her.
14. PW3, **Kalisi Marama** is the aunt of both the accused and the victim. She’s related to the family of N.W’s father. She had come to the birthday calibration was with the children when N.W has come to her and whispered that she wanted to tell her something and that she did not want anyone to hear. Later on around 5 o’clock, when she took her home and asked her she had said that *Sepo rubbed his penis onto her anus*. That morning N.W’s mother too had been in the house. However, due to the gathering she had not been able to speak to her. She narrates that N.W’s mother was married to this family but the family was against her on this issue. After this had transpired, she says that all but N.W’s mother had been against the girl and had not wanted this matter to be reported. However, Kalisi says that she herself has a daughter and did not want her daughter to be disbelieved if something like this was to happen to her. So after discussing with the family, she had decided to report this to the authorities. She had asked the accused if he did it but the accused had denied. She had told this to a person working for the Medical Services Pacific who had informed the police and the police

had then come and investigated this matter. She said that reporting this was very difficult and she was visibly emotional and in tears in court too.

15. In cross examination she admitted that Iosefo was living at Joji's house during this time. When she was asked as to exactly what N.W said, the witness narrated in i-Taukei as follows; "*aunty, Iosefo has done something using hill balls to my anus, I was shocked he spilt the water on me*". She had also demonstrated and shown how it was done and said that she had wanted to shout or run but had been afraid because the accused told her that, "*he might hit me.*"

Defence Evidence

16. The Accused Iosefo Kalaidreketi testified and he called his grandmother Salome Matai to give evidence on his behalf. According the accused **Iosefo**, on the 12th of December he was drinking and playing cards with his uncles Toni and Joji and another person named Toni. He also says John was also there. Around 7.00 or 8.00 p.m, he and his friend had come down to the house of Salome to take a box of matches and his charger and also to close the doors and window of uncle Joji's house. The accused has come with his cousin Kilione to Salome's house. He says that he entered from the side door which was opened. He also has seen the kitchen door opened. He had gone in to the sitting area and met his grandmother and got the matches and collected the charger.
17. In the living room he had seen Esther talking to his grandmother. However, he had not seen N.W. He had entered through the kitchen door and through the passage gone to the sitting area and then collected the matches and the charger. He admits that Esther saw him coming in. After collecting the charger, he has left and heard his grandmother closing the door from inside. He has not been in the house for more than 1 minute. From there he had gone to uncle Joji's house, closed the windows and returned to where they were playing cards.
18. They spent the night playing and the following morning the accused had gone to uncle Joji's place to prepare the food for the birthday celebration. He had been preparing the lovo for the birthday party when N.W's mother and unce Joji have arrived and asked him if he did anything to N.W up there. The accused had denied and said that he did not go there. The accused had wanted them to ask N.W herself. Then all of them had gone

up called N.W and asked her. At that time the accused, N.W's mother, uncle Joji have been there and N.W's maternal grandmother had been in a shed close-by. When the girl was asked, she had first said, 'no' and when they were asking, she had kept quiet. Thereafter the birthday party has progressed as scheduled. However, after the accused went back to his work place, his mother had called him on a Sunday and wanted him to seek forgiveness for the arguments that were taken place within the family. The accused had come and told that he did not do this and then Kalisi had told him if you didn't do anything the investigation will proceed. He had told her it is up to her to continue. Thereafter, the police had come and taken him.

19. He says that Niana's mum and his mum were not in good terms but, as far as his relationship with N.W and Esther, it was alright and he had no problem. His firm position is that he only came to his grandmother's house once and that he did not see or speak to N.W on that occasion. Kalisi he admits is related to his family but N.W's mum was in good terms with her. Finally, when he was asked as to what he got to say about this allegation the accused said, "*I cannot say anything about this allegation*".
20. In cross examination he admitted that N.W's mum came there between 7 and 8 in the morning. He also admits that on that day the girl's mother was out and the father also was not at home and that N.W may have been sleeping in the house. It was suggested to him that he had forceful sex with N.W which he denied. It was also suggested that he and uncle Joji were standing close to the girl when she was questioned and that is why she said, no when asked in the first instance which he denied. He said that his grandmother Salome was in the nearby shed. He said that this allegation was made up by Esther and not N.W.
21. According to the evidence of **Saloma Matai** she is also referred to as Nau. She's 71 years of age and Iosefo is her grandchild. She has brought him up from his young days. He had been living in her house since he was small until he shifted to Joji's house quite recently.
22. On the 12th of December 2021 she had been in the sitting room with Esther, Eleni (N.W's maternal grandmother) and Tuata her youngest son and N.W has been sleeping in another room. She says that after 9.00 p.m, Sepo came in, in the night and that he came in from the main door that was opened. She confirms that he took the matches

and the charger and left within 1 minute from the main door and she closed it. She also says that after Sepo left she locked the doors including the kitchen and the side door. She specifically said that after locking these three doors from inside, she took the keys and kept it with her and that she is the only one who has the keys. She went on to say that these doors cannot be opened from outside. The following morning, she had opened the doors as she got up to make the tea.

23. The following day the birthday party had been held and that morning N.W's mother had come and there was a discussion as to what happened to N.W. She had seen the girl been questioned by Joji and the girl had said nothing. She had heard, they asking her if Iosefo entered her room. N.W had said she doesn't know. She admits that the relationship between Iosefo and N.W's family was good until last December. N.W is her granddaughter as well. However, after this incident there had been much displeasure and Iosefo's mum has wanted to reconcile. On which day Kalisi had asked the accused but the accused has denied.
24. She had looked after Sepo, sent him to school and fed him since Sefo was 3 years old. She had been shocked and annoyed as well as hurt when she heard this allegation. However, she admits that the accused is free to enter her house anytime and anyway he wishes. In cross examination she admitted that the accused may enter her house without her knowing and on that day she would not have known if he came whilst she was asleep. Upon being questioned she admitted that this house is made of wood and that there is a key to lock the front door from inside. However, she admitted that the rear/side door does not have a key but only a latch the Kitchen door appears to have a similar lock.

Evaluation of the Defence Evidence

25. The accused main stance is that he came in to Salome's house just once during that night and when he left his grandmother Salome locked all the doors and he did not return to the house again. In support of this he called Salome as a witness. Salome did say that she locked all three doors after Iosefo left.
26. However, according to Iosefo he claims to have come in to the house through the side door. But Salome says that he came in from the front door. Thereafter she did positively

say that she locked all the three doors with keys and the keys she kept with her. However, when questioned further she admitted that the rear side door does not have a key. It is only a latch and she admitted that she has not tried to open it from outside. Salome during her examination in chief took a firm position of locking all the doors and keeping the keys with her. However, in view of the subsequent admission that the rear doors do not have keys her evidence becomes weak and it appears that she tried to impress this court that she did lock all the doors with keys from inside and that you need keys to open all the doors. This is clearly incorrect and false in view of her own subsequent admission. Not only that whilst the accused claim to have entered the house through the side door, Salome says that he entered from the front door. This is a serious contradiction which clearly shows that Salome is not sure or had not seen how the accused came in to the house. When she was giving evidence I observed that she was extremely eager to positively say that she locked all the doors with keys and that the accused could not have re-entered the house that night. However, by her own evidence she has contradicted herself as regards the locking of the doors. This contradiction has arisen not due to the faulty memory but due to the utterance of a deliberate lie or untruth in an attempt to support the accused's position that he did not return.

27. The accused says that he entered through the side door and the kitchen door was also open when he came in. He had also entered the kitchen door and gone to the corner of the passage. Thus the accused has been walking in various parts of the house but Salome says that from the time the accused entered that she observed him throughout his 1 minute stay in the house she has not seen the accused go to the kitchen or the passage. This confirms that witness Salome is not truthful. She has uttered false evidence merely to support the accused. In these circumstances the position taken up by the defence that all the doors were locked is contradictory as to the door of entry and is clearly false as regards locking all doors. Considering the totality of the defence evidence for the afore said reasons I am of the view that accused's evidence and the defence are false and improbable and accordingly the defence evidence is thus rejected.
28. The finding of falsity and rejection of the defence evidence by itself will not in any way help to prove the charge nor would it lead to a finding of guilt, because to do so would be to forget who has to prove the case. It is the Prosecution who is required to prove all ingredients and the guilt. The legal burden of proof is on the Prosecution. I must assess

all the evidence that I accept as reliable and consider if the evidence satisfies me of the Accused's guilt beyond reasonable doubt. As stated at the outset the starting point is the presumption of innocence. I must treat the Accused as innocent until the State has proved his guilt. The presumption of innocence means that the Accused does not have to establish his innocence. The State must prove that Accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof. It is not enough for the prosecution to persuade this court that the Accused is probably guilty or even that he is very likely guilty. It is certainly not an absolute certainty. What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the Accused after I have given careful and impartial consideration to all of the evidence. In summary, if, after careful and impartial consideration of the totality of the evidence including the defence positions and suggestions, I am sure that the Accused is guilty is when I can find him guilty. On the other hand, if I am not sure that he is guilty, I cannot find him guilty. Though I have rejected the defence evidence I would now venture to consider the totality of the evidence to ascertain if there be any reasonable doubt and if not, to ascertain if the prosecution is able to prove all ingredients beyond reasonable doubt.

Evaluation of the Prosecution Evidence

29. Both Esther and N.W were of extreme young age when they gave evidence. The State counsel had made preliminary inquiries by way of questions to both of them to ascertain their understanding and ability to give evidence. Both the witnesses responded in a satisfactory manner upon which I was satisfied that they understand the difference between the truth and lies. Thereafter both of them gave evidence under oath. Both these witnesses were afforded the facility to give evidence from a concealed position linked through Skype with the consent and agreement of the defence.
30. As far as the evidence of Esther is concerned there was no cross-examination and as such no contradiction or omissions arose. As for the demeanor she appeared to be quite relaxed and responded promptly to the questions. She did not show any undue or keen interest in responding to the questions. The defence at a later stage suggested to N.W that it was Esther who fabricated this story, nothing was suggested to Esther. Since a suggestion was made to other witnesses, I would consider this suggestion and its effects on Esther's evidence. The suggestion was that Esther had made a similar allegation

against her own father and that it was Esther fabricated and told the story to N.W. In the first instance considering her age and also the extreme tender age of N.W it is somewhat improbable that Esther would and could get N.W to repeat such a false story. If Esther was so minded to fabricate a story against the accused she could have said that she saw the accused coming into the house and going into the room where N.W was. She does not say anything of that nature. She merely said that she was informed by N.W. This is not the normal way in which you would expect Esther to have fabricated a story. Therefore, the very nature of her evidence makes this suggestion highly improbable. Thus, this suggestion does not affect the credibility of her evidence. Esther had acted promptly by informing her father and as he did not act, she then informed their mother. This is confirmed by the fact of her mother arriving immediately in the morning and questioning the accused, which is also admitted by the defence.

31. As regards the evidence of N.W she was cross-examined by the defence. She was an extremely small child who was provided with the facilities to give evidence from a concealed position. She was given paper and pencil and was in a relaxed environment and the questions was put to her through a female interpreter. I observed that she was engrossed with drawing and painting whilst being questioned. Both during evidence in chief and cross examination she continued to be drawing and also she was provided with some food shortly after the cross examination commenced as she was hungry. She was enjoying her meal and drawing whilst being cross examined. Therefore, both during her evidence in chief as well as cross examination N.W was not concentrating in narrating the incident but was routinely responding to questions and giving very spontaneous answers without delving or thinking about what she was asked. The effect of this is that it was obvious that her answers were not pre-planned or repetition of memorized script but natural responses of things she knew and narrative of something she had actually experienced. Therefore, her demeanor was extremely good and consistent with that of a truthful witness.
32. As to promptness, immediately after the incident she had rushed to her maternal grandmother Elina and tried to wake her up but as she was told not to disturb her, she had slept besides her grandmother. The fact of she was so sleeping near the grandmother was confirmed by the defence witness Salome. On the following morning she had informed her sister Esther of the alleged act. Then she has also told this to her

aunt Kalisi during the course of the day. Therefore, she had promptly and consistently conveyed this to who were close to her. However, according to the accused's evidence and the suggestions when she was questioned, she had said 'No' and then she had kept silent. This gave rise to a certain degree of concern in my mind. If I may elaborate, why did N.W say 'No' when she was asked if Iosefo did something to her? It is common ground that N.W was questioned in the presence of uncle Joji, N.W's mother, N.W's, Salome her paternal grandmother and the accused. The evidence especially that of Kalisi clearly shows that from the time this matter came to light the family including N.W's own father have not been keen to accept this incident and have tried to downplay this incident. Esther have told this to her father who had not done anything. Kalisi said that it was extremely difficult for her to inform this to the authorities as the family was not in favour. N.W's mother had been helpless as observed by Kalisi. Salome the paternal grandmother giving evidence said that even as at today she was unable to believe that her grandson the accused would have done something like this. It is obvious that due to familial affinity all of them were of one mind to ignore or not to believe N.W's revelation. In this hostile background when the victim a small child of 7 years is asked in the presence of the accused himself of this incident it is obvious and understandable that N.W would be intimidated and extremely reluctant to tell this in public in that environment. When N.W met Kalisi during the party she had whispered and told that she wants to tell something, and it was only after Kalisi took N.W to her house and in the confines of the house that N.W revealed the details. Therefore, it is obvious that her answer 'No' was due to the circumstances that she was in, and when questioned again she remained silent confirms that her answer 'No' was just a way out of that situation and not the truth. Therefore, I am of the view that this does not affect the credibility or the reliability of N.W's evidence.

Probability

33. N.W described the act as '*putting his balls into her buttocks*'. In the course of her evidence she said that the accused approached from a rear and committed this act as such she saw him when he stood up. She did demonstrate the position she was in when the act was committed. It was side-ways in a lying down position with the accused behind her. According to Kalisi's evidence when the girl had narrated the incident, she had actually in the same manner demonstrated the position she was in. This had been the following day immediately after the incident. There possibly could not have been

any time or opportunity to teach her to do this. Long after that she naturally and spontaneously demonstrated while giving evidence without any prompting. This can be so done by such a small girl only if she had actually experienced such an event. Thus her evidence is probable, realistic and credible.

Recognition of the Accused

34. This incident had happened in the night. N.W being girl of extreme young and immature age had been asleep when the accused had come in to her room and commenced the act then she appears to have woken up and seen that it was the accused. From her evidence she appears to have actually seen him when he stood up. Then she says that the accused told her not to wake up anybody and has left the room and gone towards the kitchen.
35. This being so though her evidence is credible this court should consider the second stage namely whether her recognition evidence is reliable. There is a difference between the identification of a person who is seen for the first time and not known prior to that and of the recognition of a previously known person when seen at a subsequent time.
36. When N.W who had known and were familiar with the Accused prior to the incident, testifies or states that, 'it is the Accused Sefo whom she saw in the night in the room it is a recognition and not an identification. There is a subtle but important difference between "recognition" and "identification". When N.W, by virtue of the prior familiarity with or prior knowledge of the Accused, perceives by her sensors that the person before her to be is Sefo, she recognises the Accused. In contrast when a witness sees the any person for the first time and perceives by his/her sensors the features of such person sufficient to spot such person if seen again, the witness identifies that person. This is the distinction between "recognition" and "identification".

Credibility and Reliability

37. I have determined that N.W is a credible and truthful witnesses. Merely by deciding that the evidence of N.W is credible will not be sufficient to determine the testimonial trustworthiness of a witness. In considering the testimonial trustworthiness of a witness

there are two aspects that a court is required to consider. One is the *credibility* or veracity and the other is the *reliability* or accuracy. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relates to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, an honest witness, may, however, still be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526): 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288]

38. The accused was very well known to the victim, her own cousin. The issue is whether she was able to recognize him that night to decide this the relevant matters would be if she has the opportunity and the occasion to see the perpetrator and recall and recap the events. All the witnesses clearly states that there was light in the kitchen, there was no door to the room. This room in which N.W was next to the kitchen. The light from the kitchen tube light falls into the room. Therefore, there had been sufficient light in the room for her to see the person who was there almost next to her. This person whom she identified as Sepo was no stranger. He had also spoken to her at this moment. She had certainly sufficient opportunity and proximity to see and identify the previously known accused. Thereafter, the accused walks to the kitchen during which time she had a further opportunity to observe the accused walking towards the light. In these circumstances, I am satisfied that the victim had sufficient opportunity to clearly observe and recognize the accused.

39. The victim had soon after the accused left run to her grandmother who was in the sitting area. This clearly proves that she was conscious and had appreciated and understood that something unwarranted was done to her and she had to tell this to an elder. This conduct further supports that she was awake, alert and was in a position to observe what she saw.

40. If I may now consider the credibility of Kalisi, there were no contradictions or appreciable omissions raised during the cross-examination. She is related to the family of the accused. The defence attempted to discredit her evidence by suggesting that N.W's mother and the accused's mother was not in good terms and that Kalisi had being on the side of the victim's mother. This was not a direct suggestion but that is a necessary inference from the line of cross-examination. Kalisi said that the reason for her to intervene and initiate this complain was for the simple reason that she herself has a daughter and would not have like her daughter to be disbelief if she was in similar circumstance. She said that it was extremely difficult for her to go against the family and to complain. According to Kalisi's evidence it was obvious that N.W's mother was helpless and was unable to proceed and complain due to the extreme family pressure. This was the reason for Kalisi's intervention, which I think is reasonable and plausible.
41. There is some evidence of displeasure and dispute between N.W's mother and Sepo's mother. This appears to have sparked off due to this incident and escalated thereafter. The spreading of stories and the dispute that so resulted was reconciled later on. In these circumstances the suggestion that a false allegation may have been made due to the dispute between the mothers, is highly improbable and unrealistic.
42. In the aforesaid circumstances the evidence of three prosecution witnesses is credible and reliable and I accept them as truthful and reliable witnesses.

Considering the totality of the evidence

43. The prosecution and the defence positions are two competing positions which are mutually not co-existing. The accused denies coming into the house a second time that night or going into N.W's room. Upon considering the totality of the evidence it is proved that the accused did come to the house and took the matches and the charger. According to Salome's evidence the accused used the front door for this purpose. According to N.W the accused had left after the act through the kitchen that is the rear door or the side door. Certainly, it cannot be and is not the front door. However, the accused in his evidence said that he entered the house through the rear side door. He does say that it was only once that he came to take the matches but admits coming through the rear side entrance. As evaluated above Salome says otherwise and she is sure that the accused came through the front door and left through the front door when

he took the charger and the matches. Thus, on the one hand the accused and his own witness Salome falls into a serious contradiction as to the door of entry that night, this evidence of the accused clearly supports the evidence of N.W as to the door used by the accused that night. The end result of this evidence is that the accused has clearly admitted entering and leaving the house from the rear or side entrance. His own witness says that when the accused came for the purpose of taking a matches he came through the front door. The only reasonable inference is that the accused had certainly entered this house on two occasions that is once from the front entrance and the second occasion through the rear or side door. This contradiction in the defence evidence has arisen not due to a mere lapse of memory but due to a deliberate attempt by the accused to falsely conceal his entry from the rear door that night into the room where N.W was sleeping. Further, as evaluated above the evidence of Salome of locking all three doors and keeping the keys with her is demonstrably false and this too is not due to any lapse of memory but due to a deliberate utterance of a lie to support the accused's position that there was an impossibility for him to have come to the house a second time.

44. As to the defence taken up that this is a false allegation I have evaluated above and concluded that Esther fabricating a story of this nature and getting N.W to repeat in this form is improbable. Further, considering the manner this was brought to the notice of the authorities by one of their family namely Kalisi makes the false fabrication even more improbable. The defence did not cross-examine or suggest this position to Esther. It was at a later stage during the trial this allegation of fabrication was raised. Thus, it is apparent that, as the trial progressed the accused had unsuccessfully attempted to create a false defence based on an afterthought. Thus, considering the totality of the evidence I am convinced that the defence evidence and the suggestion have not been able to create any reasonable doubt as to the prosecution evidence.

Proof of the Charge

45. On the above analysis the prosecution has proved beyond reasonable doubt that the accused and accused himself did come into the room where N.W was sleeping on the night of the 12th of December 2021. He had approached her from the rear or her posterior and put his balls into her buttocks. As demonstrated by N.W she was lying sideways and the accused had approached from her rear. According to Kalisi she does

say the victim used the word 'Polo' in iTaukei which was translated as balls. The victim does say the balls was put into the in to her buttocks and she felt pain. She also pointed out on a doll the rear buttock area and the anal area as being the place where the accused put his balls in. Witness Kalisi said that she was told that the accused rubbed his penis into N.W's anus. However, when Kalisi was asked to repeat the very words uttered by the girl, she said that, "*Iosefo has done something using hill balls to my anus, I was shocked he spilt the water on me.*"

46. The charge is one of rape with carnal knowledge. The prosecution must prove that the penis of the accused did enter the anus of the victim even in a slight degree. The evidence certainly proves that the accused had used his naked genitalia and placed it on the anus or between the buttocks of the girl.

47. Buttocks is the back of a hip that forms one of the fleshy parts on which a person sits (Marriam Webster dictionary) and your buttocks are the two rounded fleshy parts of your body that you sit on (Collins Dictionary). Hence the buttocks will mean and include the posterior of a person that will consist of the two rounded fleshy muscles and the lobes of the posterior which surrounds the anal area including the anus. In the present case there is no doubt that the accused has placed and brought into contact his naked genitalia on the posterior naked body of the victim. This was evident by the demonstration on the doll. This by itself will not prove that the accused did insert his penis into the anus. One of the inferences maybe that the word balls is used to include and mean the penis. Putting into the buttocks may also similarly means and include the anus and putting something thereto. However, in the absence of some evidence to explain as what is meant by the use of the term ball and putting into buttocks are, the only and the necessary inference or the meaning of this evidence will not be that the penis had been inserted. It can also mean that the accused had placed his genitalia on or between the buttocks which may even be an intra-cruel act. Therefore, the prosecution has proved that the accused had placed and rubbed and brought into contact his genitalia on the buttocks of the victim but has not proved beyond reasonable that there was penetration of the anus.

Alternate count of Sexual Assault

48. In these circumstances by virtue of section 162 of the Criminal Procedure Act the court is empowered to consider and convict in respect of an alternate or lesser offence which the evidence has proved. Sexual assault as defined under section 210 of the Crimes Act is a lesser or an alternate offence to that of Rape.
49. For the accused to be found guilty of “sexual assault” under section 210 (1)(a), the prosecution must prove beyond reasonable doubt, the following elements: (i) the accused (ii) unlawfully and indecently (iii) assaulted (iv) the female complainant.
50. 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.
51. The ingredients of Sexual assault under 1st limb of section 210 and indecent assault under section 212 of the crimes Act are the same except for the titles to the respective sections. Thus in general, sexual assault will be involuntary sexual contact that occurs through the Accused's use of force, coercion or the victim's incapacitation. The law will consider the victim incapacitated if he or she did not have the mental ability to understand the nature of the sexual acts, or if the victim was physically incapable of indicating her unwillingness to participate in the sexual conduct. Common examples of these charges may arise from the use of alcohol or date rape drugs, both of which can make it impossible for a victim to legally consent to sexual conduct.

Conclusion

52. Accordingly, I hold that the prosecution has failed to prove beyond reasonable doubt the count of rape as charged but has proved beyond reasonable doubt that the accused had committed sexual assault by placing his naked genitalia on the naked buttocks of the victim. Accordingly, I find the accused guilty of the offence of Sexual Assault under section 210 of the Crimes Act and hereby convict him of the said offence.
53. In a count of rape of whatever form, penetration is a necessary component and in the present case the prosecution should prove that the penis of the accused did *penetrate* the

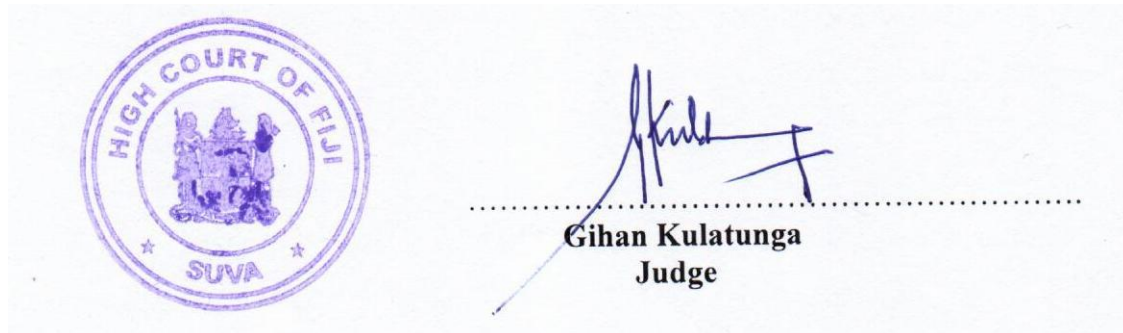
anus to some degree. Penetrate as we understand is to go through or to pass through. Thus penetrating the anus when considered with the above description will be to go through at least in the slightest degree through the anal orifices. In the present case N.W was asleep and just woke up at the time and has certainly has felt the accused's genitalia touching the anal area and the may be even the anal orifice. She does not say that she felt the pens penetrating within the anus or touching the inner aspect. She does says that she felt pain but it was not elicited if it was from within the anus. Kalisi says that she was told that the penis *rubbed* in to the anus. Considering the notorious and the common knowledge of the human anatomy if the panty was pulled down to her thighs, parting her legs will certainly be restricted and correspondingly gaining access in to the anal orifice will be inhibited. There is no evidence as to how the legs were positioned when this act was performed. This may make penetration of the anus somewhat difficult as her legs could not be easily parted due to the panty especially as she was lying sideways on the mattress. There is no doubt that the Accused did place his naked genitalia between the two lobes of N.M's buttocks but there is some uncertainty if the penis entered the anal orifice and penetrated the anus.

54. In the aforesaid circumstances the accused may have not been able to penetrate the anus is a probable inference. Similarly there is a possibility that accused driven by an extreme sexual desire may have inserted his penis into and within anal orifice. When there are two probable inferences one in favour of the accused should be preferred. This is the rule in criminal cases such this. Thus, I am of the view that the prosecution has proved beyond reasonable doubt that the Accused did place his naked genitalia the pens on the bare buttocks of the complainant but has failed to prove on the required criminal standard that the penis did penetrate the anus at least in a slight degree. Accordingly I hold that count of rape as charged is not proved to that extent.

55. However there is clear proof of the accused placing and rubbing his penis between the buttocks of the complainant and committing an act of a sexual nature. Thus I am satisfied that putting the penis into the buttocks is proved beyond reasonable doubt. The accused commenced this act when the N.M was a sleep and when she woke up, she had resisted but had been subdued and she has submitted due to fear. This conduct clearly shows that N.M had faced something which she did not like and this had without doubt been committed without her consent. That's why she reacted in that way and tried to kick the

accused, ran to her grandmother and told Esther and Kailsa of the same. Clearly this had been done without her consent. To that extent the accused being her own cousin of 20 years of age committing the said on a 07-year-old minor is conduct which is indecent by any reasonable decent man's standard and in the normal course of events this act is of a sexual nature committed by applying unlawful force. Thus it clearly amounts to a sexual assault contrary to Section 210 (1) (a) of the Crimes Act.

56. I have held that the prosecution has failed to prove the act of rape as charged as the penile penetration of the anus is not proved. However I am satisfied that the prosecution has proved beyond reasonable doubt that the Accused did on the 12th of December 2020 put his penis into the naked buttocks of the complainant N.W and thereby has proved the alternate charge of sexual assault contrary to Section 210 (1) (a) of the Crimes Act beyond reasonable doubt. Accordingly acting under and in terms of section 162(1)(f) of the Criminal Procedure Act I find the Accused guilty for the said alternate count of sexual assault and convict him accordingly. Subject to the conviction of the alternate charge as afore stated I hold that the accused is not guilty of the count of rape as charged.
57. The Accused is convicted of the alternate count of sexual assault punishable under Section 210 (1) (a).



At Suva
08th September, 2022.

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