

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 102 of 2020

STATE

V

MARIKA LUTU

Counsel : Ms. Saini Naibe for the State
Ms. Alanieta Bilivalu for the Accused

Dates of Trial : 22-25 & 28 November 2022

Closing Submissions : 6 December 2022

Judgment : 1 March 2023

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "TT" or simply "T".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused above-named is charged with the following offences:

FIRST COUNT

(Representative Count)

Statement of Offence

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

Particulars of Offence

MARIKA LUTU, between the 1st day of January 2020 and the 30th day of April 2020, at Veisaru, Ba, in the Western Division penetrated the vagina of **TT**, a child under the age of 13 years old, with his finger.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

MARIKA LUTU, on the 1st day of May 2020, at Veisaru, Ba, in the Western Division, penetrated the vagina of **TT**, a child under the age of 13 years old, with his finger.

- [2] The accused pleaded not guilty to the two 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 two counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) 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) (b) makes reference to a person penetrating 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. In the instant case, the accused has been charged in Counts 1 and 2, for penetrating the vagina of the complainant with his finger.

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

- (i) The accused;
- (ii) During the specified period (in this instance between 1 January 2020 and the 30 April 2020);
- (iii) At Veisaru, Ba, in the Western Division;
- (iv) Penetrated the vagina of the complainant TT, with his finger;
- (v) At the time the complainant TT was a child under the age of 13 years.

[10] Similarly, in order to prove the second count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance the 1 May 2020);

- (iii) At Veisaru, Ba, in the Western Division;
- (iv) Penetrated the vagina of the complainant TT, with his finger;
- (v) At the time the complainant TT was a child under the age of 13 years.

[11] To further elaborate upon these elements in respect of the two counts of Rape. The first element is concerned with the identity of the person who committed the offences. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offences.

[12] In respect of Count 1, the second element relates to the specific time period during which the offence was committed. In respect of Count 2, the second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offences were committed. The prosecution should prove these elements beyond reasonable doubt.

[13] The fourth element involves the penetration of the complainant's vagina, with the accused's finger. 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 finger to any extent.

[14] The final element is that at the time of the incidents 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 only 4 years at the time of the alleged incidents of Rape, and therefore, she had no mental capacity to give consent. [Her date of birth being 30 May 2015].

[15] Count 1 is also titled as a Representative Count. Section 70 (3) of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act") provides as follows:

When a person is charged with any offence of a sexual nature and the evidence points to more than one separate acts of sexual misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of a sexual nature occurred.

In such a case the charge must specify in the statement of offence that the count is a representative count.

[16] Therefore, as per legal terminology a representative count is based on an act or series of acts said to be done by the accused during the specified time period as stated in the said charge. In this instance, the prosecution is expected to prove just one incident of Rape, which falls within the period stipulated in the said charge. They need not prove a continuous or a series of incidents of Rape in support of a representative count.

[17] It must also be noted that in terms of Section 129 of the Criminal Procedure Act, it is stated that no corroboration of the complainant's evidence is necessary to prove an offence of a sexual nature; Rape and Sexual Assault are obviously considered as offences of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

[18] In this case an application was made by the prosecution in terms of Section 134 of the Criminal Procedure Act, to tender the two statements made by the complainant to the Police on 28 May 2020 and 29 May 2020 as admissible evidence. This was primarily due to the fact that the complainant was only 4 years of age at the time of the alleged incidents.

[19] Section 134 of the Criminal Procedure Act is reproduced below.

"134. — (1) In any criminal proceedings, a written statement by any person shall, if such of the conditions mentioned in sub-section (2) as are applicable are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person.

(2) The conditions referred to in sub-section (1) shall be that —

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his or her knowledge and belief and that he or she made the statement knowing that, if it were tendered in evidence, he or she would be liable to prosecution for any statement in it which he or she knew to be false or did not believe to be true;

(c) at least 28 clear days before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of

the party proposing to tender it, on each of the other parties to the proceedings;

(d) none of the other parties or their lawyers within 14 days from the service of the copy of the statement serves a notice on the party so proposing, objecting to the statement being tendered in evidence under this section.

(3) The conditions stated in sub-section (2) (c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be tendered.

(4) The following provisions shall also have effect in relation to any written statement tendered in evidence under this section—

(a) if the statement is made by a person under the age of 21 years, it shall state the age of the person;

(b) if it is made by a person who cannot read it, it shall be read to the person before signature in a language he or she understands and shall be accompanied by a declaration by the person who read the statement to the effect that it was so read; and

(c) if it refers to any other document as an exhibit, the copy served on any other party to the proceedings under sub-section (2)(c) shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy of it.

(5) Notwithstanding that a written statement made by any person may be admissible as evidence under this section —

(a) the party by whom or on whose behalf a copy of the statement was served may call that person to give evidence; and

(b) the court may of its own motion, and shall on the application of any party to the proceedings, require that person to attend before the court and give evidence or to submit to cross-examination.

(6) So much of any statement as is admitted in evidence under this section shall, unless the court otherwise directs, be read aloud at the hearing and where the court so directs an account shall be given orally of so much of any statement as is not read aloud.

(7) Any document or object referred to as an exhibit and identified in a written statement rendered in evidence under this section shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement.

(8) A document required by this section to be served on any person may be served—

(a) by delivering it to the person or to his or her lawyer; or

(b) by addressing it to the person and leaving it at his or her usual or last known place of abode or place of business or by addressing it to his or her lawyer and leaving it at his or her office; or

(c) by sending it by registered post to the person at his or her last known place of residence or place of business, or addressed to the person's lawyer at his or her office; or

(d) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or sending it by registered post addressed to the secretary or clerk of that body at that office.

(9) The provisions of this section are subject to any provisions of any law dealing with the giving and admissibility of evidence in criminal cases, and shall be read and applied subject to the provisions of such a law."

[Emphasis is mine].

[20] The Learned Defence Counsel had no objection to this application made by the State.

[21] In the opinion of Court, since the recorded statements satisfy the conditions stipulated under Section 134 (2) of the Criminal Procedure Act, this Court permitted the application made by the State to tender the two statements made by the complainant to the Police as admissible evidence.

The Agreed Facts

[22] Section 135 of the Criminal Procedure Act deals with "Admission of facts". The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

[23] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

1. The complainant in this matter is TT (“the complainant”), born 30th May 2015, she was 4 years 11 months and 1 day old on 1st May 2020.
2. The accused in this matter is Marika Lutu (“the accused”), born 1961 and residing in Veisaru, Ba since birth.
3. The complainant’s biological mother is Amelini Saulo.
4. The accused is the de-facto partner of Amelini Saulo’s biological mother.
5. In January 2020, Amelini Saulo and her family moved to stay with her biological mother and the accused in Veisaru, Ba.
6. In the beginning of Term 1, 2020, the complainant was attending Veisaru Sanatan Dharam School kindergarten.
7. The accused was caution interviewed by DC 5121 Lanyon in the i-taukei language, which commenced on 29th May 2020.
8. The accused was formally charged by DC 5623 Josefa Qalowasa in the i-taukei language on 30th May 2020.

ISSUE

The issue that the Honourable Court is now left to deliberate on is:-

- i. Whether the accused between the 1st day of January 2020 and the 30th of April 2020, at Veisaru, Ba, penetrated the vagina of TT, a child under the age of 13 years, with his finger?
- ii. Whether the accused on 1st of May 2020, at Veisaru, Ba, penetrated the vagina of TT, a child under the age of 13 years, with his finger?

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

Case for the Prosecution

[25] The prosecution, in support of their case, called the complainant (TT), her mother Amelini Saulo, Dr. Bharti Devi and Dr. Emali Druma.

[26] The prosecution also tendered to Court a copy of the statement made by the complainant to the Lautoka Police on 28 May 2020 (hand written statement in the ITaukei Language) as Prosecution Exhibit **PE1 (a)**, the English translation of the said statement as Prosecution Exhibit **PE1 (b)**, a copy of the statement made by the complainant to the Ba Police on 29 May 2020 (hand written statement in the ITaukei Language) as Prosecution Exhibit **PE2 (a)**, the English translation of the said statement as Prosecution Exhibit **PE2 (b)**, the copy of the Medical Examination Report of the complainant (Medical Examination conducted by Dr. Bharti Devi) as Prosecution Exhibit **PE3** and the copy of the Medical Examination Report of the complainant (Medical Examination conducted by Dr. Emali Druma) as Prosecution Exhibit **PE4**.

[27] Evidence of the complainant TT

- (i) *The complainant's evidence was recorded over a period of 2 days. Her evidence was recorded in a 'closed court' and a screen was placed so that the complainant could not see the accused.*
- (ii) *Further measures were taken in this case whereby the Judge and all Counsel dispensed with their wigs and gowns at the time the complainant was testifying and where the Judge sat at the Court Officers' table below to hear the complainant's testimony.*
- (iii) *At the time of testifying in Court the complainant was 7 years of age. This Court was satisfied that the complainant was competent of taking her oath prior to giving evidence.*
- (iv) *At the commencement of her testimony the contents of her police statements were read out aloud in Court.*
- (v) *Accordingly, the English translation of the statement made by the complainant to the Lautoka Police on 28 May 2020 [Prosecution Exhibit PE1 (b)], and which is admitted as evidence, reads as follows:*

Q1: *Good morning T, I am Babara a Police Officer, have you had your breakfast?*

A: *Yes I have already had breakfast, I had bread with egg.*

Q2: *What is the reason you are admitted here at the hospital?*

A: *I came to get my injection because of the sickness.*

- Q3: *What is your sickness?*
A: *The doctor checked my "moli" (vagina).*
- Q4: *Why did the doctor have to check your "moli" (vagina)?*
A: *My "moli" is usually paining since grandfather did something with my "moli".*
- Q5: *What did Tai (Marika Lutu) did with your "moli"?*
A: *He usually lie me down and used his fingers to poke into my "moli".*
- Q6: *Can you show me which finger did he use?*
A: *This finger (victim) shows her right pointer finger.*
- Q6: *How many times did your grandfather poke his finger into your "moli"?*
A: *He does it four times to me.*
- Q7: *Which places T?*
A: *In the sugar cane field towards Gyan and Dharmend's shop. Close to those sugar cane field he usually lie me down there. He usually takes me to the shop then after that he took me close to the sugar cane field close to the shop, for me to take off my panty.*
- Q8: *What all does he do to you besides the sugar cane field close to the shop?*
A: *Tai (Marika Lutu) usually lie me down and touched my "moli" he usually pointed his finger into my "moli" and it usually gets hurt, Tai then told me "gavui".*
- Q9: *Did Tai usually tells you something?*
A: *He usually tells me "gavui" when it usually hurts, he also uses the soap on my "moli" on Friday in the bathroom when I was having my bath.*
- Q10: *Which bathroom?*
A: *At home (Veisar).*
- Q11: *Who all were at home?*
A: *Only my Tai.*
- Q12: *Did Tai told you anything else?*

A: He said "do not tell your mother that I am touching your moli", he will never buy me juice and cake because he usually buys it from the shop.

Q11: Do you wish to say anything else?

A: No.

(vi) Similarly, the English translation of the statement made by the complainant to the Ba Police on 29 May 2020 [Prosecution Exhibit PE2 (b)], and which is admitted as evidence, reads as follows:

T my name is Loraina Bula I am a Police Officer and I wish to ask you some more questions. Would you be able to answer?

A: Yes.

Q1: Which Friday were you saying that your grandfather touched your "moli" in the bathroom?

A: That morning it was raining and my grandmother Taina went to Muana.

Q2: Had Bu Taina returned or not?

A: Not yet.

Q3: What did Tai Marika did to you in the bathroom?

A: I was bathing and Tai Marika came and bath me.

Q4: What did Tai Marika did when he was bathing you?

A: He soaked his hand and insert it right inside and told me "gavui".

Q5: Which hand did he insert right in?

A: This hand (victim showed her left pointer finger).

Q6: Where was your mother when Tai was bathing you?

A: She was in the room with baby.

Q7: Did Tai told you anything whilst he was bathing you?

A: He told me "gavui" and for me not to shout.

Q8: Which shop did you went first when Tai touched your "moli"?

A: Dharmend's shop.

Q9: What did Tai and you went and bought from Dharmend's shop?

A: We went and bought biscuit.

- Q9: *When did you two went and bought biscuit?*
A: *In the morning.*
- Q10: *Who all were at home when you went with Tai to Dharmend's shop?*
A: *Mother, Bu Taina and baby.*
- Q11: *How many packet biscuit did you and Tai bought?*
A: *Only one.*
- Q12: *Was there any other time Tai touched your "moli" when you went to the shop?*
A: *Yes when we went and bought ice block and biscuit from Suken's shop.*
- Q13: *This time when you went with Tai to buy the biscuit, who was at home?*
A: *Mother, Bu Taina and baby Navi.*
- Q14: *What happened when you went with Tai to Suken's shop?*
A: *When we were coming back from Suken's shop, Tai told me to lie down.*
- Q15: *What did he do when you lie down?*
A: *Tai then inserted his finger into my "moli".*
- Q16: *Which finger did Tai used to insert it into your "moli"?*
A: *This finger (victim showed her left pointer finger).*
- Q17: *When you were going to the shop with Tai, was it day time or night time?*
A: *It's always day time.*
- Q18: *When was the first time did Tai touched your "moli"?*
A: *The day is not so far.*
- Q19: *Can you show me where is your "moli"?*
A: *Yes this (victim pointed at the vagina).*
- Q20: *When you went with Tai to Dharmend's shop, which clothes were you wearing?*
A: *It's a warm clothes.*

Q21: *What is the colour for that warm clothes?*

A: *Pink.*

Q22: *What clothes was Tai wearing?*

A: *Long trousers.*

Q23: *On that day when you went and bought ice block and you eat biscuit with Tai to Suken, what clothes were you wearing?*

A: *Black tights and singlet colour (victim pointed at the colour blue that D/Sgt. Kamal was wearing).*

Q24: *What clothes was Tai wearing when you two went to Suken?*

A: *Long trousers and singlet.*

(vii) *In addition to the above, further questions were put to the complainant by the Learned State Counsel. The complainant confirmed that she is still residing in Veisaru Ba. She is attending Toga District School, which is located in Vunisea (in Rewa, Nausori). She said that the name of her biological mother is Amelini Saulo. She is the only child in her family and has no siblings.*

(viii) *The baby Navi she referred to her statement is Navitalai Qerea, whose mother is one Melini.*

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

Q. *T do you know where Tai Marika is?*

A. *Back road my Lord.*

Q. *How do you know Tai Marika?*

A. *Bu Taina brought him home.*

Q. *Who is Bu Taina?*

A. *She is my grandmother.*

Q. *Bu Taina, is she your mother's mother?*

A. *Yes.*

Q. *Can you tell us what is "moli" or where is your "moli"?*

Witness pointed towards her private part (towards the area of her groin).

Q. *Can you tell us what happened to your "moli"?*

A. *We came back from the shop then he made me lie down. Then he poked my "moli".*

- Q. *Who poked your "moli"?*
A. *Tai Marika.*
- Q. *Did you feel anything when Tai Marika poked your "moli"?*
A. *It hurts.*
- Q. *Where did he make you lie down?*
A. *At the sugar cane field.*
- Q. *You said he poked your "moli". How did he poked your "moli"?*
A. *He used his right pointer finger [witness demonstrated by showing the pointer finger (index finger) of her right hand].*
- Q. *Did it happened again?*
A. *Yes.*
- Q. *Where was this?*
A. *In the bathroom.*
- Q. *Whose bathroom?*
A. *Our bathroom.*
- Q. *What happened in the bathroom?*
A. *He poked my "moli".*
- Q. *Who poked your "moli"?*
A. *Tai Marika.*
- Q. *How did he poked your "moli"?*
A. *He used his pointer finger.*
- Q. *When Tai Marika poked your "moli", how did it feel?*
A. *It hurts.*
- Q. *Before he poked your "moli", what actually happened in the bathroom?*
A. *He soaped me and poked my "moli".*
- Q. *Was this at night or during the day?*
A. *Daytime.*
- Q. *When Tai soaped you, were you wearing any clothes?*
A. *No.*

Q. *Did Tai Marika tell you anything inside the bathroom?*

A. *Yes he told me "gavui".*

Q. *You said it happened in the sugar cane field the first time remember?*

A. *Yes.*

Q. *At the sugar cane field, did Tai Marika tell you anything?*

A. *Yes he said "gavui".*

Q. *When all these happened, did you tell anyone?*

A. *Yes to my mother.*

Q. *What did your mother do?*

A. *Then my mother took me to the hospital.*

Q. *Why did your mother take you to the hospital?*

A. *For injection.*

Q. *That injection, what was it for?*

A. *Because Tai Marika poked my "moli".*

Q. *If you see Tai Marika again, will you be able to recognize him?*

A. *No.*

Q. *Would you like to see Tai Marika again?*

A. *No.*

- (x) *Since the complainant said she does not want to see Tai Marika again, dock identification of the accused was not carried out.*
- (xi) *The complainant was cross examined by the defence.*
- (xii) *The complainant confirmed that what she said about Tai Marika touching her "moli" in the sugar cane field was true. She also confirmed that what she said about Tai Marika soaping her body and touching her "moli" in the bathroom was true.*
- (xiii) *The witness said that she had informed her mother that Tai Marika had touched her "moli". This was after Tai Marika had done so.*
- (xiv) *The complainant confirmed that she usually goes to Dharmend's Shop with Tai Marika, the accused. When going to Dharmend's Shop, usually she goes with the accused and no one else.*
- (xv) *Regarding the incident which took place in the bathroom, the witness reiterated that at the time there was no one else in the bathroom (other than for herself and the accused).*

(xvi) *The witness agreed that she was staying in one aunty Litia's house in Veisaru. This was when she was in Veisaru Kindergarten. She remembers that at the time she was staying in aunty Litia's house her mother and Tai Marika having a small fight. She was unaware as to what the fight was about or what happened after that.*

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

Q. *Do you remember what clothes you were wearing at the sugar cane field?*

A. *No.*

Q. *At the sugar cane field, did Tai Marika touch you on top of your panty or inside your panty?*

A. *He touched the outside.*

Q. *Were you wearing one long pink pants at the time?*

A. *Yes.*

Q. *Did Tai Marika touch your "moli" outside of your pink trousers or did he put his hands inside?*

A. *He touched the outside.*

Q. *In the bathroom when Tai Marika touch your "moli" can you point to which part did he touch?*

Witness pointed towards her private part/towards the area of her genitalia and showed how the accused had touched her in that area.

Q. *Do you know which hand Tai Marika used to touch your "moli"?*

The witness shows her right forefinger (pointer finger).

Q. *When Tai Marika touched your "moli" inside the bathroom, did he put his pointer finger inside or did he put it on top of your stomach?*

A. *He was just touching the top.*

Q. *You said when Tai Marika touched your "moli" he was saying "gavui"?*

A. *Yes.*

Q. *Does Tai Marika always say that word to you? Is it a truth or a lie?*

A. *It is the truth.*

(xviii) *In re-examination, the State Counsel attempted to clarify from the witness the answers given by her in cross examination. The following questions were inter alia asked from the witness and she answered as follows:*

Q. *In the sugar cane field you agreed that Tai Marika touched the outside (of your trousers)?*

A. *Yes.*

Q. *What do you mean by that? That Tai Marika touched the outside of your trousers.*

A. *He only touched the outside.*

Q. *What did Tai Marika touch?*

A. *"Moli".*

Q. *Whose "moli"?*

A. *My "moli".*

Q. *Inside the bathroom, you said you were not wearing any clothes?*

A. *Yes.*

Q. *Can you tell me how did he touched your "moli" on top?*

The witness demonstrated with her hands how the accused did so.

(xix) *The Fijian-English dictionary meaning of the word "gavui" means (adj) "useless to others, ineffectual (of a person), uncooperative, listless and lazy, implicitly dirty". In Ra this word can be slang for "naughty".*

[28] Evidence of Amelini Saulo

- (i) *The witness testified that she is 27 years of age. She is residing at Toga in Nausori, with her mother, her brother and wife and their children. She is doing domestic duties.*
- (ii) *The complainant is her daughter. Her date of birth is 30 May 2015.*
- (iii) *Apart from the complainant, she has two other children. Her son Navitalai Qerei, who is 3 years old and a daughter Jimaima Siteri, who is 1 year old.*
- (iv) *The witness testified that in the year 2020 she was staying at Veisaru in Ba. It is also an agreed fact that in January 2020, the witness and her family moved to stay with her biological mother and the accused in Veisaru, Ba. She was residing there with her children, her mother and step-father. Her step-father's name is Marika Lutu. Prior to that, she had been residing at Toga in Nausori (her maternal grandfather's house).*

- (v) *The witness said that the complainant had been looked after by her mother and her step-father, since she was 1 year old. "She was brought in so that I can stop breast feeding her".*
- (vi) *She cannot recall for how long her mother and step-father stayed together. The witness said she was 20 when she came into contact with her step-father. She confirmed that her mother and step-father are no longer together.*
- (vii) *It is an agreed fact that in the beginning of Term 1, 2020, the complainant was attending Veisaru Sanatan Dharam School Kindergarten. The witness was asked whether she recalls anything that happened in January 2020. She said she had found some discharge in the complainant's panty and thought it was a thrush due to the complainant eating too much of sweets. She said she had detected this discharge since a foul smell was coming from the complainant. The witness had given the complainant some herbal medicine to drink. She had not asked the complainant about the discharge.*
- (viii) *The witness next testified to the events which took place on 24 May 2020. At around 4.30 in the afternoon that day, the witness, her elder sister and two other siblings were sitting under the mango tree. The children were all playing. When the complainant ran past, her elder sister had felt a foul smell from her and had called the complainant. Her elder sister had removed her panty and found a discharge on the complainant. The witness too had felt the foul smell and seen the discharge.*
- (ix) *At that time the complainant had said that Tai Marika had been harassing her. When asked to explain further the complainant had said that her grandfather had touched her "moli" once. That her grandfather was fondling with her "moli". The complainant had been crying at the time. The complainant had said that this had happened at the sugar cane field.*
- (x) *The witness was questioned as to what happened around 8.00 a.m on 1 May 2020. She said that they had celebrated her mum's 55th birthday. After that her mother had left for Suva. She, the kids and the accused had remained at home. She confirmed that the complainant had gone on her own to have a bath in the bathroom. The witness had been in her room bathing her baby son. When asked where the accused was at the time, the witness said: "Nowhere to be found".*
- (xi) *The witness said that she had taken the complainant to the Ba Hospital. At the hospital she had been examined by one Dr. Emali. The witness had been present at the time of the examination.*
- (xii) *After examination, the doctor had given the complainant an injection and then transferred her from Ba to the Lautoka Hospital. They had proceeded to the Lautoka Hospital in an ambulance-the witness, the complainant and a nurse from Ba Hospital.*
- (xiii) *The witness said that on arrival at the Lautoka Hospital the Police Officers and the doctor were waiting. The complainant had been examined by a female*

- doctor. The complainant had been admitted and was in hospital for four days receiving injections for her condition.
- (xiv) When asked as to why the Police were waiting, the witness said that Dr. Emali had reported the matter to the Police based on what the complainant had told the doctor.
- (xv) The witness explained that she did not go to the police to report the matter on the same day (24 May 2020), because she did not have cash with her that day. She had waited for her elder sister to collect her wages. (Upon collecting her wages) her sister had given her the money and only then had they gone to the Ba Hospital. She said she wanted to first get the medical report before going to the Police Station.
- (xvi) The witness testified that she had been shocked when the complainant had said that her step-father, the accused, had touched her “moli”. “I couldn’t believe that he will do it to my child my Lord”.
- (xvii) The witness said that the complainant and her step-father had a close relationship. The witness said that her relationship with her step-father was also good. Her step-father was actually her real uncle. His mother and my mother’s father are brothers and sisters.
- (xviii) The witness identified the accused Marika Lutu as her step-father.
- (xix) The witness was cross-examined at length by the defence.
- (xx) The witness agreed that the complainant had been looked after by her mother and the accused since she was 1 year old. At the time the witness had gone to Samoa to visit her mother’s sister.
- (xxi) She agreed that she returned just in time for the complainant to start kindergarten. At the time she realized that there was a bond that had developed between the complainant, her mother and her step-father. Therefore, it was difficult for her step-father to let the witness take the complainant back to Nausori. This had led to an argument between the witness and the accused. As a result the witness had taken the complainant and moved to her older sister Litia’s house. This was also in Veisaru. The distance between her step-father’s house and Litia’s house was like from Court to town.
- (xxii) The witness agreed that in January 2020 just before the school term started for the year, she and the complainant had moved to Litia’s house. She further agreed that she never returned back to live with her step-father after she had moved to Litia’s house.
- (xxiii) However, later the witness testified that on 1 May 2020, she was living at her step-father’s house. She testified that she had returned to live with her step-father in May 2020.
- (xxiv) The witness agreed that the complainant made the complaint to her in May 2020 and at the time the complaint was made that she and the complainant were living at Litia’s house.
- (xxv) It was suggested to the witness that in the month of May 2020, she and the complainant were living at her sister Litia’s house and not at her step-father’s

house. The witness said that they were staying together. However, after the incident happened to the complainant, they had moved out.

(xxvi) Later the witness agreed that in the month of May she was already living with Litia and not at her step-father's house.

(xxvii) It was further suggested to the witness that from the beginning of the school term in January 2020 to May 2020, the time she had received the complaint (that whole period from January 2020 to May 2020), she had been living with Litia. The witness denied this suggestion and said that they were staying together with her step-father.

(xxviii) The witness agreed that the complaint made to her by the complainant was that the accused had touched her "moli" at the sugar cane field. The witness further agreed that the sugar cane field is located near the store (shop) and just besides Tai Lorima's house.

(xxix) The witness said that normally the complainant would cry to go to the shop with the accused and that the complainant and the accused would go to the shop together.

(xxx) The witness said she cannot recall any arguments she had with the accused in 2020.

(xxxi) She denied that she told the complainant to tell the doctor or the Police that the accused touched her "moli".

(xxxii) The witness agreed that the thrush was happening even when they were staying at the accused house. However, she denied that the complainant was having some boils on her thighs.

(xxxiii) The witness agreed that at no time did she let the accused to bath the complainant alone – this is because he is her grandfather – he is a man and she is a small girl.

(xxxiv) It was suggested to the witness that she had forced the complainant to tell the Police that the accused had touched her "moli". It was also suggested that she had manipulated the complainant to say the things she said to the Police, because she did not like her step father. The witness denied these suggestions.

(xxxv) The witness said that the complainant usually refers to her private part as "moli".

(xxxvi) In re-examination the following questions were asked from the witness to clarify certain answers given by her in cross-examination:

Q. In the year 2020 which months did you stay with your step father?

A. January to May 2020.

Q. When did you move to Litia's house?

A. The time my mother left for Toga.

Q. When was that?

A. During her birthday – the next day she left.

- Q. *When was your mother's birthday?*
 A. *I forgot.*
- Q. *At least the month?*
 A. *Her birthday is between the 29th and 30th of April. I am not sure about the date.*
- Q. *In the beginning of May 2020 where were you staying?*
 A. *With Tai Marika.*
- Q. *How long did you stay at Litia's house?*
 A. *Not that long.*
- Q. *When T had told you about what happened to her, where were you staying?*
 A. *At Litia's place.*
- Q. *What was the reason to move to Litia's place?*
 A. *Because my mum went to Nausori.*

[29] Evidence of Dr. Bharti Vandana Dutt

- (i) *The Doctor testified that she is currently practicing at the Nadi Hospital. She is 31 years of age.*
- (ii) *She had graduated with an MBBS Degree from the Fiji School of Medicine in 2016. Thus she has been practicing as a Medical Officer for the past 5 ½ years.*
- (iii) *The witness said that she has been based at the Nadi Hospital since March 2022. In 2017 she was a Medical Intern at CWM, in 2018 and 2019 she was working at the Valelevu Health Centre, taking care of outpatients and emergency cases. In 2020 she joined the Lautoka Hospital as a Paediatric Registrar. She served in that capacity for 2 years until February 2022.*
- (iv) *The witness confirmed that in 2022 she was based at the Paediatric Department of the Lautoka Hospital.*
- (v) *The witness testified that she had conducted the medical examination on the complainant, TT, at the Lautoka Hospital Paediatric procedure room. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE3.*
- (vi) *The witness testified that this was a case referred to her by Dr. Emali of the Ba Hospital. The complainant had been admitted to the hospital. Thus the findings were recorded in the admission folder plus in the Fiji Police Medical Examination Form.*

- (vii) *The witness confirmed that the date of birth of the complainant (as recorded in PE3) was 30 May 2015. Thus at the time of examination the complainant was 4 years and 11 months old.*
- (viii) *The witness testified that this patient was presented to her on 26 May 2020, at about 4.42 p.m. The history was taken on the day the patient was admitted. However, a thorough physical examination was done on 27 May 2020, at 2.00 p.m.*
- (ix) *The Doctor testified as to the specific medical findings as found in column D12 of the Medical Examination Report. Upon examination of the genital area, the vulva, that is the space around the vagina, was noted to be pinkish in colour which is a normal variant. Apart from that, there was no active injury, no bruising, no swelling, no abrasions, no bleeding that was noted. No vaginal discharge was noted at the time of examination. It is also recorded at D12 that a high vaginal swab (HVS) was taken from the child.*
- (x) *As to her professional opinion as found in column D14, the doctor said that in terms of just the physical examination, there were no obvious injuries noted around the genitalia area. There was no obvious injury, discharge or anything we could identify in the genitalia area.*
- (xi) *The doctor testified as to the clinical management of the patient as depicted in column D15.*
- (xii) *As to the summary and conclusions as found in column D16 the doctor said according to the history that was given of persistent vaginal discharge, as per theory and clinical practice, the most common causes of persistent vaginal infection in young girls is sexual assault. However, her examination was normal.*
- (xiii) *The doctor further testified that as per the history given by the complainant's mother (column D10), the child was noted to have vaginal discharge 4 days prior to the examination.*

[30] Evidence of Dr. Emali Bobo Druma

- (i) *The Doctor testified that she is currently practicing at the Ba Health Centre. She is 36 years of age.*
- (ii) *She had graduated with an MBBS Degree from the Fiji School of Medicine in 2011. She has been practicing as a Medical Officer for the past 9 years. In addition she hold a Post Graduate Diploma in Family Medicine from Fiji National University (FNU) in 2020. She is a General Practitioner.*
- (iii) *The witness said that she has been based at the Ba Health Centre for 9 years. From the time she graduated as a doctor, she has been working at the Ba Health Centre. She works at the General Outpatient Department (OPD) and also takes care of childhood illnesses.*
- (iv) *The witness confirmed that she had conducted the medical examination on the complainant, TT, at the Ba Health Centre on 26 May 2020, at 2.00 p.m. At*

the time of the examination, the complainant's mother was present. The mother had given her consent to the doctor conducting the said medical examination. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE4.

- (v) Since the original Medical Examination Report was not available, Court permitted a copy (carbon copy) of the Medical Report to be marked. Although the Defence was originally objecting to the carbon copy being marked, later the objection was withdrawn.*
- (vi) As to the initial impression of the person to be examined, column D12 it is recorded that the child was active and very cooperative during the time of the examination. The child was able to explain what her grandfather did to her and where it happened when asked.*
- (vii) The witness testified that when the mum and the child came in that day, the mum was concerned about what she had noticed with the child. The mother had explained that for the past 3 days she had been noticing discharge on the undergarments of the child when bathing her. This discharge was foul smelling.*
- (viii) The doctor said that during the examination it was the mother who was explaining why she had brought child for examination. During the interview the doctor had spoken to the child as well. The child was able to answer some of the questions the doctor had asked her.*
- (ix) The Doctor testified as to the specific medical findings as found in column D12 of the Medical Examination Report. She stated that pinkish area around the vulva looks abraded (from scratching). When parting labia – urethral meatus looks red and swollen. Redness extending down to vaginal opening. Serous (watery fluid), yellow fluid noted within. Vaginal opening appears larger than normal. When swab of fluid was taken, child complained of pain around the vagina.*
- (x) The doctor explained in detail as to the specific medical findings in column D12.*
- (xi) Under other observations (column D13), the doctor has recorded that there was no bruises on face, trunk or extremities.*
- (xii) As to her professional opinion as found in column D14, the doctor said that the examination findings showed inflammation within the vulva and around the vagina that mostly reflected infection accurately.*
- (xiii) The doctor testified as to the clinical management of the patient as depicted in column D15. She stated that she had discussed the complainant's condition with Dr. Bharti and transferred the complainant to the Lautoka Hospital for further assessment.*

[31] At the end of the prosecution case Court decided to call for the defence of the accused. 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.

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

Case for the Defence

[33] Evidence of Marika Lutu

- (i) *The witness testified that he is 61 years old and currently residing at Drasa in Lautoka. Prior to that, he was residing at Veisaru in Ba. He is employed as a Labourer.*
- (ii) *The witness testified that in the year 2020 he was residing at Veisaru, Ba with his wife Taina and the complainant (T). Taina is the complainant's grandmother. The complainant is Amelini's daughter. Amelini is his step daughter.*
- (iii) *The witness said that he and Taina have been together for 10 years.*
- (iv) *When asked for the reason for the complainant to be living with him and Taina, the witness said: "We were weaning her (after birth)". He did not recall exactly how old the complainant was when she was brought to them. However, the complainant was living with them for 4 to 5 years. At the time the complainant's mother was in Samoa.*
- (v) *The witness said that after the complainant attended kindergarten, her mother came and tried to take her to Nausori. The witness had asked the complainant's mother if she could take the complainant after the school term (second term), but she insisted on taking her.*
- (vi) *When asked whether the complainant's mother eventually took the complainant, the witness said: "No. She was trying to take her. Then this allegation against me came up. When I was taken in then she came and took her".*
- (vii) *The witness completely denied the first allegation made against him. He said they were all lies.*
- (viii) *When asked whether he knows the reasons as to why the complainant would make up such allegations against him, the witness said: "It is all because of a phone. Amelini was supposed to wash my clothes. She did not come to wash my clothes. So I took away the phone from Amelini.....The phone belonged to me.....I took the phone today – the next day the Police came to arrest me".*
- (ix) *Similarly, the witness completely denied the second allegation made against him. He said they were all lies. He did not bath the complainant. The witness further stated that the complainant and her mother were not at home during that period. They were at Litia's place. Litia is Amelini's older sister.*

- (x) *The witness said during this time, he was living alone in his house. He was in the cane field.*
- (xi) *When asked why the complainant would make up such allegations against him, the witness said: "It is solely because of the phone I had taken away from them".*
- (xii) *Regarding the first incident which allegedly happened in the sugar cane field, the witness reiterated as follows: "That is all lies. I had looked after that child since she was little and she knows how I am. She always does what her mother tells her. If not she gets a beating from her mother. About this allegation, she would have been told to come and say what she said.*
- (xiii) *With regard to the second incident which happened inside the bathroom at Veisaru, the witness testified as follows: "Those were all lies. They were all at Litia's place".*
- (xiv) *The witness said that prior to these incidents being reported to the Police, his relationship with the complainant had been good. When he comes back home (after work), she will be happy to see him. The complainant was fond of him and the two of them shared a close bond.*
- (xv) *The witness was cross-examined at length by the Learned Counsel for the State and prosecution case theory was put across to him. However, the witness consistently denied the allegations made against him by the complainant.*
- (xvi) *The prosecution highlighted the following inconsistencies in the testimony given in Court by the witness vis a vis his statement made under caution to the Police on 29 May 2020:*

1. *In his testimony in Court, the witness said that he had gone to Suken's Shop together with the complainant and her mother. However, in his statement made to the Police, it is recorded as follows (at Question and Answer 81):*

Q. According to the statement of TT, 4 years old of Veisaru, Ba, she stated that when you two went to the shop grandma Taina, mother and baby Navi were staying at home. What do you wish to say about this statement?

A. Yes, they were at home when we went and bought biscuit and ice block.

2. *In his testimony in Court, the witness denied that the complainant and her mother were still at home on 1 May 2020. His testimony is that they had gone to Litia's place by that time.*

However, in his statement made to the Police, it is recorded as follows (at Question and Answer 100):

Q. According to Amelini Saulo's statement, she stated that day when her mother already went and only left back at

home was her step father Marika, her and two children.

What do you wish to say about this?

A. Yes, they were still at home.

(xvii) In re-examination the witness denied having said so to the police.

Analysis

- [34] As stated before, the prosecution, in support of their case, called the complainant (TT), her mother Amelini Saulo, and two medical officers, Dr. Bharti Devi and Dr. Emali Druma. The accused decided to testify on his own behalf.
- [35] The burden of proving each ingredient of the charges 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 all the elements of the charges beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove at paragraphs 9 and 10 of this judgment.
- [36] As I have 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.
- [37] Based on the said admitted facts it is admitted that the complainant is the biological daughter of the Amelini Saulo. It is also admitted that the accused is the de-facto partner of Amelini Saulo's biological mother Taina. Therefore, the accused is the step-grandfather of the complainant. It was revealed in evidence that the complainant had been looked after by the accused and her grandmother (his de-facto partner), since she was one year old. Therefore, the identity of the accused is not in dispute, as he was well known to the complainant.
- [38] It is an admitted fact that the complainant's date of birth is 30 May 2015. Thus at the time of the incidents alleged, the complainant was only 4 years old, and a child under the age of 13 years. At the time she testified in Court she was 7 years of age.
- [39] Therefore, the primary issue of dispute in this case is the physical act, namely whether the accused penetrated the vagina of TT, with his finger, as stated in Counts 1 and 2.
- [40] I have summarized the evidence of all witnesses led during the trial.

- [41] The accused totally denies all the allegations made against him by the complainant. The defence position is that the allegations made against him by the complainant are all false and were instigated against him by the complainant's mother.
- [42] However, it must be borne in mind that the complainant in this case is not merely complaining of an isolated incident or a single act. Here the complainant has testified to a sequence of events or a series of acts which the accused perpetrated on her, on two separate occasions (at the sugar cane field and in the bathroom), between 1 January 2020 and 1 May 2020. Therefore, it is the opinion of this Court that it is highly unlikely for the complainant, who was merely 4 years old at the time, or for her mother, to make up or manufacture such a sequence of events against the accused, unless the incident really took place.
- [43] Therefore, considering the totality of the evidence in this case, it is my opinion, that the defence version of a total denial cannot be accepted as truthful and reliable, and as such, I reject the defence version.
- [44] In this case Court permitted an application made by the prosecution in terms of Section 134 of the Criminal Procedure Act, to tender the two statements made by the complainant to the Police on 28 May 2020 and 29 May 2020 as admissible evidence. The defence had no objection to this application.
- [45] Accordingly, a copy of the statement made by the complainant to the Lautoka Police on 28 May 2020 (hand written statement in the ITaukei Language) was tendered to Court as Prosecution Exhibit PE1 (a), the English translation of the said statement was tendered as Prosecution Exhibit PE1 (b), a copy of the statement made by the complainant to the Ba Police on 29 May 2020 (hand written statement in the ITaukei Language) was tendered to Court as Prosecution Exhibit PE2 (a) and the English translation of the said statement was tendered as Prosecution Exhibit PE2 (b).
- [46] In terms of Section 134 (1) of the Criminal Procedure Act the contents of the two statements are admissible as evidence to the like extent as oral evidence to the like effect by the complainant.
- [47] In addition, the complainant was examined-in-chief, cross-examined and re-examined in the usual manner by the Learned Counsel for the prosecution and defence.

[48] In her statements to the police and her further evidence-in-chief, the complainant has stated that the accused had poked or inserted his pointer finger into her vagina (she has used the word moli), at the sugar cane field and in the bathroom. However, in cross-examination she was asked the following questions and she answered as follows:

Q. *Do you remember what clothes you were wearing at the sugar cane field?*

A. *No.*

Q. *At the sugar cane field, did Tai Marika touch you on top of your panty or inside your panty?*

A. *He touched the outside.*

Q. *Were you wearing one long pink pants at the time?*

A. *Yes.*

Q. *Did Tai Marika touch your "moli" outside of your pink trousers or did he put his hands inside?*

A. *He touched the outside.*

Q. *In the bathroom when Tai Marika touch your "moli" can you point to which part did he touch?*

Witness pointed towards her private part/towards the area of her genitalia and showed how the accused had touched her in that area.

Q. *Do you know which hand Tai Marika used to touch your "moli"?*

The witness shows her right forefinger (pointer finger).

Q. *When Tai Marika touched your "moli" inside the bathroom, did he put his pointer finger inside or did he put it on top of your stomach?*

A. *He was just touching the top.*

[49] In re-examination, the Learned Counsel for the State attempted to clarify the above answers given by the complainant, but to no avail. The complainant stood by the version given by her during cross-examination, to the effect that the accused touched her outside her clothes in the sugar cane field and on top of her genital area in the bathroom.

- [50] I am aware that the complainant was only 4 years old at the time of the incidents alleged. However, I am not in a position to turn a blind eye to this piece of crucial evidence.
- [51] The complainant's mother, Amelini Saulo, was the recent complaint witness. She testified that on 24 May 2020, she had been at her elder sister's house. At around 4.30 in the afternoon she, her elder sister and two other siblings were sitting under the mango tree, while the children were all playing. When the complainant ran past, her elder sister had felt a foul smell from her and had called the complainant. Her elder sister had removed her panty and found a discharge on the complainant. The witness too had felt the foul smell and seen the discharge.
- [52] At that time the complainant had said that the accused had been harassing her. When asked to explain further the complainant had said that her grandfather had touched her "moli" once or that he had been fondling with her "moli". The complainant had been crying at the time. The complainant had said that this had happened at the sugar cane field.
- [53] This clearly qualifies as a recent complaint. It is trite law with regard to recent complaint evidence that the complainant need not specifically disclose all of the ingredients of the offences and describe every detail of the incidents, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. I am satisfied that the complainant made a proper complaint in this case. Accordingly, I consider that her credibility is strengthened in view of that recent complaint.
- [54] I must emphasize that I have borne in mind that the recent complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [55] The prosecution also led the evidence of two medical officers, Dr. Bharti Devi and Dr. Emali Druma. The copy of the Medical Examination Report pertaining to the medical examination conducted on the complainant by Dr. Bharti Devi, on 27 May 2020, at the Lautoka Hospital, was tendered to Court as Prosecution Exhibit PE3; while the copy of the Medical Examination Report pertaining to the medical examination conducted on the complainant by Dr. Emali Druma, on 26 May 2020, at the Ba Health Centre, was tendered to Court as Prosecution Exhibit PE4.

[56] However, the medical evidence in this case is not conclusive proof of evidence of penetration. It must be also borne in mind that these medical examinations on the complainant had been conducted over three weeks after the 1 May 2020, which is the date of alleged offending in Count 2.

[57] Therefore, considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove the charges of Rape beyond reasonable doubt. Accordingly, in the light of this evidence the accused cannot be found guilty for the charges of Rape.

[58] However, in terms of Section 162 of the Criminal Procedure Act, I am of the opinion that the accused has committed the lesser offence of Sexual Assault, by touching the complainant's genitalia with his finger, in respect of both counts one and two.

[59] 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)

[60] Therefore, in order for the prosecution to prove the charge of Sexual Assault in respect of Count 1, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this instance between the 1 January 2020 and the 30 April 2020);
- (iii) At Veisaru, Ba, in the Western Division;
- (iv) Unlawfully and indecently assaulted TT, the complainant, by touching her genitalia with his finger.

[61] Similarly, in order for the prosecution to prove the charge of Sexual Assault in respect of Count 2, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified date (in this instance 1 May 2020);
- (iii) At Veisaru, Ba, in the Western Division;

(iv) Unlawfully and indecently assaulted TT, the complainant, by touching her genitalia with his finger.

[62] 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. The touching of the complainant’s genitalia by the accused with his finger, is clearly an indecent act and amounts to Sexual Assault.

[63] In the circumstances, I find the accused guilty of Sexual Assault in respect of both counts one and two.

[64] Accordingly, I convict the accused of Sexual Assault in respect of both counts one and two.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 1st Day of March 2023

Solicitors for the State: Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused: Office of the Legal Aid Commission, Lautoka.