

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 08 of 2019

STATE

V

ROBERT WILLIAM STOMAN

Counsel : Ms. Prenika Lata for the State
Mr. Iqbal Khan with Mr. Anil Prasad for the Accused

Dates of Trial : 13 March & 15-17 March 2023

Closing Submissions : 21 March 2023

Judgment : 4 May 2023

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

JUDGMENT

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

COUNT 1

Statement of Offence

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

Particulars of Offence

ROBERT WILLIAM STOMAN, between the 1st day of June 2018 to 9th day of January 2019, at Nadi, in the Western Division, penetrated the vulva of **MMD**, a child under the age of 13 years, with his tongue.

COUNT 2

Statement of Offence

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

Particulars of Offence

ROBERT WILLIAM STOMAN, between the 1st day of June 2018 to 9th day of January 2019, at Nadi, in the Western Division, touched the vagina of **MMD**, a child under the age of 13 years, with his fingers.

COUNT 3

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Act 2009.

Particulars of Offence

ROBERT WILLIAM STOMAN, between the 1st day of June 2018 to 9th day of January 2019, at Nadi, in the Western Division, unlawfully and indecently assaulted **MMD** by touching her buttocks.

COUNT 4

Statement of Offence

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

Particulars of Offence

ROBERT WILLIAM STOMAN, between the 1st day of June 2018 to 9th day of January 2019, at Nadi, in the Western Division, penetrated the vagina of **MMD**, a child under the age of 13 years, with his finger.

COUNT 5

Statement of Offence

PORNOGRAPHIC ACTIVITIES INVOLVING JUVENILES: Contrary to Section 62A (1) (b) of the Juveniles Act Chapter 56.

Particulars of Offence

ROBERT WILLIAM STOMAN, between the 1st day of June 2018 to 9th day of January 2019, at Nadi, in the Western Division, took photographs and made video recordings of pornographic activities of **MMD**, a juvenile, on his mobile phones.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 4 days. Thereafter, the Learned Counsel for the Defence and State Counsel 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 three counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act; one count of Indecent Assault, contrary to Section 212 (1) of the Crimes Act and one count of Pornographic Activities Involving Juveniles, contrary to Section 62A (1) (b) of the Juveniles Act No. 13 of 1973, as amended by the Juvenile (Amendment) Act No. 29 of 1997 (Juveniles Act).
- [6] I will first deal with the three counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act.

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

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

[8] 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.

[9] 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 Count 1 for penetrating the vulva of the complainant with his tongue, and in Counts 2 and 4, for penetrating the vagina of the complainant with his fingers/finger.

[10] 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 June 2018 and the 9 January 2019);
- (iii) At Nadi, in the Western Division;
- (iv) Penetrated the vulva of the complainant MMD, with his tongue;
- (v) At the time the complainant MMD was a child under the age of 13 years.

[11] In order to prove the second 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 June 2018 and the 9 January 2019);
- (iii) At Nadi, in the Western Division;

- (iv) Touched the vagina of the complainant MMD, with his fingers;
- (v) At the time the complainant MMD was a child under the age of 13 years.

[12] Similarly, in order to prove the fourth 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 June 2018 and the 9 January 2019);
- (iii) At Nadi, in the Western Division; –
- (iv) Penetrated the vagina of the complainant MMD, with his finger;
- (v) At the time the complainant MMD was a child under the age of 13 years.

[13] To further elaborate upon these elements in respect of the three 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.

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

[15] The fourth element involves the penetration of the complainant's vulva, with the accused's tongue, in respect of Count 1; touching of the complainant's vagina, with the accused's fingers, in respect of Counts 2; and the penetration of the complainant's vagina, with the accused's finger, in respect of Count 4. 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 vulva of the complainant with his tongue (in respect of Count 1); touched the vagina of the complainant with his fingers (in respect of Count 2) and penetrated the vagina of the complainant with his finger (in respect of Count 4) to any extent.

[16] It may be important at this stage to distinguish between the vulva and the vagina of a female. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones

that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus *i.e.* the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina. Therefore, it is clear one has to necessarily penetrate the vulva before penetrating the vagina. (Vide *Volau v. State* [2017] FJCA 51; AAU0011.2013 (26 May 2017); where the Fiji Court of Appeal commented upon this distinction).

[17] 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. In terms of Section 207 (3) of the Crimes Act, 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 6 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 31 August 2012].

[18] The third count against the accused is a charge of Indecent Assault, contrary to Section 212 (1) of the Crimes Act. The offence of Indecent Assault is defined in Section 212 (1) of the Crimes Act as follows:

(1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.

[19] Therefore, in order to prove the third count of Indecent Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this instance between 1 June 2018 and the 9 January 2019);
- (iii) At Nadi, in the Western Division;
- (iv) Unlawfully and indecently assaulted MMD, the complainant, by touching her buttocks.

- [20] To further elaborate upon these elements in relation to this count of Indecent Assault. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [21] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [22] The accused would be guilty of Indecent Assault, if he unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for Court to consider and decide whether the touching of the complainant's buttocks by the accused, is an indecent act and thereby amounts to Indecent Assault.
- [23] 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 Indecent 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.
- [24] The fifth and final count against the accused is a charge of Pornographic Activities Involving Juveniles, contrary to Section 62A (1) (b) of the Juveniles Act, as amended. It is to be noted that the Juveniles Act No. 13 of 1973, was amended by the Juvenile (Amendment) Act No. 29 of 1997.
- [25] Section 62A (1) of the Juveniles Act (as amended) is reproduced below:

(1) Any person whether in public or in private, who

(a) records from, reproduces, places onto, views, or accesses on or from, media or records of pornographic activity directly or indirectly involving juveniles, or persons who look like juveniles whether they are or not;

(b) or who makes, participates in, uses, observes, publishes, solicits, advertises distributes, traffics in, lets on hire, buys, sells, offers to sell, media or records of pornographic activity directly or indirectly involving juveniles, or persons who look like juveniles whether they are or not;

commits a felony and is liable on conviction-

(i) in the case of a first offender, to a fine not exceeding \$25,000 or a term of imprisonment not exceeding 14 years, or both; or

(ii) in the case of a second or subsequent offence, to a fine not exceeding \$50,000 or life imprisonment, or both.

[26] Therefore, in order to prove the fifth count of Pornographic Activities Involving Juveniles, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this instance between 1 June 2018 and the 9 January 2019);
- (iii) At Nadi, in the Western Division;
- (iv) Either in public or in private;
- (v) Directly or indirectly;
- (vi) Took photographs and made video recordings of pornographic activities involving the complainant MMD; and
- (vii) At the time the complainant MMD was a juvenile.

[27] To further elaborate upon these elements in relation to this count of Pornographic Activities Involving Juveniles. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

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

[29] I will further elaborate upon the fourth, fifth and sixth elements together. The prosecution should prove beyond reasonable doubt that the accused either in public or in private; directly or indirectly; took photographs or made video recordings of pornographic activities involving the complainant.

[30] Section 62A (12) of the Juveniles Act states that: *"records" includes film, audio-visual work, microfilm, video, computer or software programme or game or interactive game, compact discs, E-Mail, internet, books, journals, photographs, or records on*

communication or telecommunication networks of whatever type, method or technology.

[31] Furthermore, Section 62A (12) provides that: *"pornographic activity" includes activity which is either indecent or obscene, or in any way judged by the standards of the time, is of a sexual nature and offensive.*

[32] In terms of the Juveniles Act (as amended) a "juvenile" has been defined to mean a person who has not attained the age of eighteen years, and includes a child and a young person. A "child" means a person who has not attained the age of fourteen years; while a "young person" means a person who has attained the age of fourteen years, but who has not attained the age of eighteen years.

The Amended Final Admitted Facts

[33] 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.

[34] Accordingly, the prosecution and the defence have consented to treat the following facts as *"Amended Final Admitted Facts"*:

1. The Complainant is MMD, a student of TA Learning Centre in Nadi residing at Lot S7 McElrath Street, Mountain View, Nadi.
2. The Complainant was 6 years old at the time of the alleged offence.
3. The Accused is Robert William Stoman, 73 years, Retired of 7 Shivor Drive, Vermont, Melbourne, Victoria, Australia.

4. The Accused was a good friend of the Complainant's father namely Garry Dunn.
5. When visiting Fiji since May 2018, the Accused used to stay with the Complainant's family.
6. The Accused owns a Samsung J5 mobile phone coloured black with IMEI number 358340082827740.
7. The Accused leases a Samsung G9 mobile phone coloured black with IMEI number 357816080257510 from Telstra Cooperation, Australia.
8. The Accused owns a Samsung Galaxy Tablet coloured white.
9. The matter was reported to the Police on 9th January 2019.
10. The Accused was cautioned interviewed by WPC 5228 Kolora N on the 10th of January 2019.

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

Case for the Prosecution

[36] The prosecution, in support of their case, called the complainant (MMD), her father Garry Raymond Dunn, her mother Mereani Naioba Dunn, Dr. Tieri Margaret Konrote and Police Officer, Savenaca Siwatibau Waqa.

[37] The prosecution also tendered to Court a copy of the Medical Examination Report of the complainant as Prosecution Exhibit PE1; an Extraction Report (showing a summary of the extraction) as Prosecution Exhibit PE2; a Samsung J5 Mobile Phone as Prosecution Exhibit PE3 and a photo sheet containing relevant photos as Prosecution Exhibit PE4.

[38] Evidence of the complainant MMD

- (i) *The complainant's evidence was recorded in a 'closed court' and a screen was placed so that the complainant could not see the accused while she testified. Court also permitted a Counsellor from the Fiji Women's Crisis Centre (FMCC), Nadi Office, to sit beside the complainant as a 'support person'.*

- (ii) *The complainant testified that she is residing in Martintar, Nadi. She is schooling at Mt. St. Mary's School, Nadi and is in Year 5. Her date of birth is 31 August 2012. Thus she is currently 10 years of age.*
- (iii) *The witness said that she lives with her mum, dad, brother and two aunties (her mother's two sisters) in Martintar, Nadi. Her father's name is Garry Dunn and her mother's name is Mereani Naioba Dunn.*
- (iv) *It is an agreed fact that the complainant was a student of TA Learning Centre in Nadi and residing at Lot 57 McElrath Street, Mountain View, Nadi (paragraph 1 of the Amended Admitted Facts).*
- (v) *The witness testified that she used to go to school by bus and return home by bus.*
- (vi) *When the witness was asked as to why she was in Court today, she answered: "I am here to speak about the bad things that Bobby did to me". When asked who Bobby was, she said: "It is (he is) my father's old best friend".*
- (vii) *The complainant said that she had known Bobby for 2 years. Bobby was living in Australia. When he came to Fiji, he used to stay at their house at Martintar-specifically at Lot 57 McElrath Street, Mountain View, Nadi.*
- (viii) *When asked to explain what bad things she was talking about, the complainant testified: "Normally when I am sleeping in the room, when I am in a deep sleep he used to put his finger into my 'joji'". The witness said that by 'joji' she meant her private part. She felt pain in her private part at the time.*
- (ix) *At the time of the said incident she was wearing a normal t-shirt, pants and her undergarments. The witness said: "He would normally take off my pants and my undergarments and he would put his finger inside and touch my 'joji'". At the time he was doing this, she was awake.*
- (x) *The complainant said that when Bobby used to do this, she would tell him to stop. However, Bobby did not stop. She would keep on telling him to stop.*
- (xi) *The witness said that she does not recall the specific date when this incident happened. However, she said she was 6 years old and was going to the TA Learning Centre at the time.*
- (xii) *When asked what other bad things Bobby had done to her, the witness said that he used to lick her 'joji' (her private part). He did so by putting his tongue on her 'joji'.*
- (xiii) *The witness said at the time of the said incident she was wearing a t-shirt, pants and her undergarments. He would lick her by taking off her pants and her undergarments.*
- (xiv) *The complainant testified that when Bobby was doing this, she would ask him to stop but he would not stop until she tells him a second time. She use to feel pain when Bobby was licking her 'joji'.*
- (xv) *When asked whether she recalls the date or time this incident happened, the witness said, she only recalls the time. It was around 10.00 – 10.30 in the night. The incident happened in her room at their house in Martintar. At the time there was no one else present in the room. Later the witness said that the said*

incident happened in the year 2018 when she was 6 years of age. She doesn't recall the specific month or date.

- (xvi) The complainant further testified to the bad things that Bobby did to her as follows: "When we normally swim in the pool-I would be swimming at the deep end and he would come close to me and he would like to put his hand on top of my private part".*
- (xvii) When swimming the witness said that she would be wearing her undergarments and a t-shirt. When asked to explain how Bobby would touch her at the time, the witness said: "He would pull out my undergarments-he would put his hand on top of my private part".*
- (xviii) The witness said that the swimming pool was located at the back of their house. During this time she was swimming, only she, her brother (who was 3 years old at the time) and Bobby were present in the pool. Her parents were in the room (in the house).*
- (xix) The witness said that when Bobby used to put his hand on her private part, she would tell him to stop. But he won't stop until she told him the next time (until she told him again to stop).*
- (xx) She explained further that Bobby used to touch her private part with his left hand-with his fingers (the witness demonstrated as to how this took place).*
- (xxi) The complainant said this incident also happened in the year 2018 when she was 6 years of age. However, she doesn't recall the specific month or date on which the incident took place.*
- (xxii) The complainant was asked apart from this whether Bobby did any other bad things to her. She explained: "When I was in the living room-I was sitting down when he came up to me and took a photo of my undergarments.....me wearing the undergarments".*
- (xxiii) When asked what she did when Bobby took this photo: "I told him what are you doing and he said nothing. I was just gonna show you a photo but it got lost."*
- (xxiv) When asked whether Bobby took any other photos of her, the witness said that she can't remember.*
- (xxv) The complainant said this incident also happened in the year 2018 when she was 6 years of age.*
- (xxvi) At this state the Learned State Counsel moved to show the witness certain photos that had been disclosed in the set of disclosures that had been filed in Court and served on the Defence. The Learned Defence Counsel objected to these photos being shown to the witness. However, this Court permitted the State to show the said photos to the witness.*
- (xxvii) Accordingly, three photographs were shown to the complainant. Photo 1 is of the complainant showing her naked upper body. Photo 4 is one of the complainant and Bobby together (showing only their faces). Photo 5 is one of the complainant kneeling forward on a plastic chair with her back facing the camera.*

- (xxviii) The witness said that she doesn't know when these photos were taken or by whom. However, she identified that Photos 4 and 5 were taken at her balcony. Therefore, the witness testified that these photos were taken without her knowledge.
- (xxix) The complainant said that apart from these incidents, Bobby did not do anything else to her.
- (xxx) The witness testified that she has still not been taught about the private parts of the human body (at school). By private part she said it meant her 'joji'. She didn't know any other word for private part or 'joji'. Thus Court permitted the Learned State Counsel to show the witness a sketch diagram of a female. [Although, the Defence objected to this sketch diagram being shown to the witness, considering the fact that the witness was only 10 years of age, Court permitted the application made by State to show the witness the said sketch diagram].
- (xxxii) Accordingly, when the said sketch diagram was shown to the complainant, she pointed to the genital area in the said diagram to indicate the private part or 'joji'.
- (xxxiii) The complainant confirmed that Bobby used to put his finger inside that part. She further confirmed that Bobby also used to lick that part. And she further confirmed that Bobby used to touch that part in the swimming pool.
- (xxxiv) The complainant further testified that she told her father about what Bobby did to her. She had told her father that Bobby has been touching, licking and putting his finger into her private part. Her father had told her to tell him the next time Bobby did this to her. The witness said this is the time she got to know that the things Bobby was doing to her was bad (stuff).
- (xxxv) The witness said that when Bobby did these things to her, she did not scream or shout. She said she did not do so because Bobby had told her that he would buy her the stuff that she wanted if she did not scream or shout.
- (xxxvi) The witness further testified that when Bobby was doing these things her stomach was painful and her private part would start to bleed a little bit.
- (xxxvii) Upon telling her father he had taken her to a doctor. The witness said this was in 2019. The doctor had asked what had happened from her father and then examined her private part. Thereafter, the doctor had told her father to take her to the Lautoka Hospital.
- (xxxviii) The complainant said that they had then gone to the Lautoka Hospital. She said that she did not know the exact place in Lautoka that her father took her to. There a lady doctor had examined her private part.
- (xxxix) Thereafter, she had returned home with her father and her father had called the Police to report the matter.
- (xl) The complainant identified Bobby as the accused in the dock (after the screen that was in place had been moved).
- (xi) The complainant was cross examined at length by the defence.

(xli) She said that there were three bedrooms in her house. She used to sleep in her bedroom. That room had only one bed. Her mother and father slept in their room, while her two aunties slept in her brother's room. The accused Bobby used to sleep in her room on the same bed that she used to sleep on. The witness said: "Bobby sleeps next to the door and I sleep towards/besides the wall".

(xlii) From her room to her parent's room the distance was about 3 to 4 metres.

(xliii) The complainant said that in the year 2018 and 2019, her two aunts were not staying at her house. They came to stay there in 2022.

(xliv) The complainant was questioned about the statement made by her at the Lautoka Police Station on the 9 January 2019. This statement had been recorded by a lady Police Officer.

(xlv) The Defence highlighted the following omissions in the testimony given in Court by the witness vis a vis her statement made to the Police on 9 January 2019:

1. Although in her testimony in Court the witness stated that during the first incident the accused took off her pants and undergarments, there is no mention of this fact in her statement made to the police.
2. Although in her testimony in Court the witness stated that during the first incident she had warned the accused to stop what he was doing, there is no mention of this fact in her statement made to the police.
3. Although in her testimony in Court the witness stated that during the second incident the accused took off her pants and undergarments, there is no mention of this fact in her statement made to the police.
4. Although in her testimony in Court the witness stated that during the third incident the accused took off her undergarments in the swimming pool, there is no mention of this fact in her statement made to the police.

(xlvi) When asked to explain as to why these matters are not recorded in the Police statement, the complainant initially said she didn't know why. Later she said that when the Police were asking the questions, they didn't ask that question.

(xlvii) It was suggested to the witness that the accused is right handed and that he did not put any finger in her 'joji'. The witness denied this suggestion and said he did.

(xlviii) Regarding the incident in the deep end of the swimming pool, it was suggested to the witness that in the deep end the accused has to float himself with both hands. The witness said, normally when the accused swims, he does not float he swims normally.

(xlix) The complainant confirmed that the two incidents she testified to namely the accused using his tongue to lick her 'joji' and about the accused inserting his finger into her 'joji' took place on two different days.

(i) It was suggested to the complainant that the accused did not do any of these things to her. However, the witness denied this suggestion and said he did.

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

Q. Why didn't you tell your mum (about what the accused did)?

A. Because mostly I normally tell my father everything and not to my mother. So I told him instead.

Q. First incident- it was dark in the night. How do you know it was Bobby who inserted his finger?

A. Because when he was doing it I felt pain. I woke up and told him to stop. And he did not stop. He just kept on doing it. That's how I know it was him.

Q. Did you see his face?

A. Yes.

Q. After which incident did you tell your father? After the first or second?

A. The second one. My father said if something else happen to tell him.

Q. After the swimming pool incident, did you tell your father again?

A. Yes.

[39] Evidence of Garry Raymond Dunn

(i) The witness testified that he is 57 years of age and residing at Lot 57 McElrath Street, Mountain View, Nadi. He lives there with his wife Mereani Dunn, his two children, and his two sister's-in-law (his wife's sisters). The complainant MMD is his daughter.

(ii) The witness said that between 1 June 2018 and 9 January 2019, only his wife and two children were staying with him at his residence.

(iii) The witness testified that he is an Australian National. He said that he knows the accused Robert William Stoman. He used to call the accused as Bobby or Bob. He had met Bobby through an Australian friend of his. He had known Bobby for about 5 to 6 years, from the first time he met him until today.

(iv) The witness said that he had first met Bobby in 2017 – 2018. While in Fiji, Bobby used to stay with a friend of his named Perry Barden, who he had sadly passed away. After his passing away, Bobby used to come and stay at the witnesses' house when he was in Fiji.

- (v) *The witness said that Bobby stayed at his house about 4 to 6 times between the period 2017 to 2019. On each occasion he used to stay approximately one week to 10 days.*
- (vi) *The witness testified that his relationship with Bobby was very good. He treated him as an Uncle and a father figure. He was a very close friend. Bobby used to sleep in the complainant's room when he comes to their place. Bobby's relationship with the complainant was also very good.*
- (vii) *The witness was asked whether MMD had complained to him about anything. He answered as follows: "Yes she did. I do not recall the exact date. She said that Bobby was touching her inappropriately. Then she mentioned that she had passed a little bit of blood from her vagina and had a sore tummy. Also she mentioned that when she woke up she found Bobby licking her vagina and also had been licking her anus and he had digitally put his fingers in her vagina." [Court is conscious of the fact that licking of the complainant's anus by the accused is an uncharged act].*
- (viii) *The witness said that at the time he had been in complete shock on hearing this (because of the friendship Bobby and he had). He couldn't even imagine anything like that happening and he had told the complainant that if anything else happened (in the future) to tell him straight away.*
- (ix) *The witness testified that the complainant had complained to him a second time – that Bobby had touched her inappropriately again. That was on the 9 January 2019. Thus, he took the complainant to their local GP at Martintar. The witness could not recall the name of the GP.*
- (x) *The witness had explained to the Doctor what his daughter had relayed to him – although she was only 6 years of age at the time. The Doctor had done an initial examination on the complainant and then referred her to a lady Doctor at the Punjas Health Center in Lautoka (who was an expert in the field).*
- (xi) *Thereafter, on the same day, he, his wife, his son and the complainant had gone to meet the said lady Doctor at the Punjas Health Center in Lautoka. The Doctor had asked his daughter as to what had happened to her. She had then examined the complainant. After the said examination the Doctor had indicated to him that there was definitely some form of sexual contact.*
- (xii) *The witness said: "It confirmed what M had told me about what had happened to her earlier (that she had been sexually abused by Bobby). Though she was only 6 years at that time she couldn't probably understand what had happened to her and why. But verbally she could indicate to me what had happened."*
- (xiii) *The witness testified that he had asked the complainant how long this had been going on for and she had said many times when Uncle Bobby would stay with them. The complainant had said that she didn't say anything to him earlier since Bobby made her to do a 'pinky promise' (which the witness had taught her for not telling lies). The witness explained further that Bobby would have made a 'pinky promise' for her not to tell Mummy and Daddy – if not she will get into trouble.*

- (xiv) *The witness said that during the examination by the Doctor only he and the complainant were present. After the examination was completed the Doctor had asked him to bring his wife and son who were outside. Accordingly, he had called his wife and the Doctor had explained to her what had happened.*
- (xv) *The witness testified that after the medical examination he had reported the matter to the Lautoka Police Station. At the Police Station the complainant's statement and his statement had been recorded by a female Police Officer.*
- (xvi) *The witness identified the accused in the dock as Robert Stoman.*
- (xvii) *The witness was cross-examined at length by the defence.*
- (xviii) *The witness was questioned about the statement made by him at the Lautoka Police Station on the 9 January 2019. The witness said that he had told the Police about what the complainant had told him (about what the accused had done to her).*
- (xix) *The Defence highlighted the following omissions in the testimony given in Court by the witness vis a vis his statement made to the Police on 9 January 2019:*
1. *Although in his testimony in Court the witness stated that the complainant had told him that the accused had been touching her inappropriately, there is no mention of this fact in his statement made to the police.*
 2. *Although in his testimony in Court the witness stated that the complainant had told him that the accused had touched her while in the swimming pool (digitally putting his fingers in her vagina), there is no mention of this fact in his statement made to the police.*
 3. *Although in his testimony in Court the witness stated that the complainant had told him that when she woke up she found Bobby licking her vagina, there is no mention of this fact in his statement made to the police.*
 4. *Although in his testimony in Court the witness stated that the complainant had told him that when she woke up she found Bobby licking her anus, there is no mention of this fact in his statement made to the police.*
 5. *Although in his testimony in Court the witness stated that on the 9 January 2019 he took the complainant to their local GP at Martintar in Nadi, there is no mention of this fact in his statement made to the police.*
 6. *Although in his testimony in Court the witness stated that when he took the complainant to their local GP at Martintar in Nadi, it was he who had relayed the entire incident to the GP (about what the complainant had told him), there is no mention of this fact in his statement made to the police.*

- (xx) *The Defence highlighted the following inconsistency in the testimony given in Court by the witness vis a vis his statement made to the Police on 9 January 2019:*

In his testimony in Court, the witness said that on 9 January 2019, he had first taken the complainant to their local GP at Martintar in Nadi (who had then referred the complainant to a lady Doctor at the Punjas Health Center in Lautoka)

However, in his statement made to the Police, it is recorded as follows: "Then I personally took my daughter to the Lautoka Hospital".

- (xxi) *The witness was asked by the Defence as to what evidence he had prior to reporting the matter to the Police. The witness responded by saying that the first thing was what the complainant had told him and secondly what the two Doctors had informed him after examining the complainant.*
- (xxii) *It was suggested to the witness that he had suspected Bobby, even without medical evidence. The witness said: "Initially my daughter told me she had been sexually abused. So I took the appropriate steps by going to my Doctor to get this verified".*
- (xxiii) *The witness confirmed that Bobby is his close friend. On 9 January 2019, Bobby was at his place. However, he explained that he did not want to approach Bobby directly at the time without any Doctor's proof.*
- (xxiv) *The witness further confirmed that in December 2018, Bobby had arrived at his house. He said he cannot remember the exact date but it was around the New Year period.*
- (xxv) *It was suggested to the witness that at the time the accused last visited his house (in December 2018), his wife had gone to her village with his daughter and his son. They had returned in January 2019. The witness agreed with this suggestion, although he said he could not recall the exact dates.*
- (xxvi) *The witness agreed that during the period his wife and children were away, he and the accused was staying in their house together.*
- (xxvii) *It was further suggested to the witness that after his wife and children returned home, his wife had an argument with him about him bringing prostitutes to the house. The witness denied the suggestion and said: "That was not the arguments was about. My wife found out about the said situation (about the prostitutes) only after Bobby was arrested and remanded. I believe he said that to get back to me for having him arrested".*
- (xxviii) *It was further suggested to the witness that he was assaulted by his wife and that he was bleeding from his face. The witness said he cannot recall. It was also suggested that, that is when he suspected Bobby of telling his wife.*

The witness said: "Incorrect. It was only after he went to jail (remand) did my wife find out about the ladies".

- (xxix) It was suggested to the witness that on 9 January 2019, he went to the Doctor with the complainant, for him to be examined for his injuries. The witness denies the suggestion.*
- (xxx) The witness said that both his son and daughter are very good in swimming. Thus he denied that either he or his wife used to be swimming in the pool or sitting on the grass nearby, when his children were swimming in the pool.*
- (xxxix) The witness agreed that at their local GP at Martintar in Nadi and at the Punjas Health Center in Lautoka it was he who was relaying the story to the two Doctors. He agreed that he was present during the entire examination.*
- (xxxii) It was suggested to the witness that he had an enmity with Bobby due to his wife confronting him about bringing prostitutes home. The witness categorically denied this suggestion and reiterated that his wife did not find out until Bobby was remanded and (she found out) only when she went to visit him in remand.*
- (xxxiii) In re-examination the witness clarified certain answers given by him in cross-examination.*
- (xxxiv) When asked as to why some of the evidence that he has given in Court is not found in his Police statement, the witness said that he believes that the lady Police Officer who took his statement was very busy and tired and it was not done professionally or properly. However, he testified that he had told the Police about all what the complainant had told him. He said further that he can't explained why she didn't record what he said – maybe it was due to her inefficiency.*

[40] Evidence of Mereani Naioba Dunn

- (i) The witness testified that she is 31 years of age and residing at Lot 57 McElrath Street, Mountain View, Martintar, Nadi. She is unemployed.*
- (ii) At Martintar she lives there with her husband Garry Dunn, her two children, and her two sisters. The complainant MMD is her daughter.*
- (iii) The witness said that between 1 June 2018 and 9 January 2019, only her husband and two children were staying at their residence.*
- (iv) The witness testified that she knows Bobby. He is also known as Bob. His full name is Robert William Stoman. She came to know Bob through a friend of her husband. Bobby used to come and stayed at their place.*
- (v) The witness said that Bobby was a good man and that she had a good relationship with him. Bobby also had a good relationship with her daughter.*
- (vi) The witness said that her daughter was sexually assaulted by Robert Stoman. She said she got to know this from her daughter. "When she finish swimming she had a shower in the bathroom. She came and told me that she had a pain in her stomach". The witness said that the complainant had not told her*

- anything else. Her daughter had informed her of this in January 2019. However, she didn't recall the exact date.
- (vii) When asked what she did, the witness said: "Well she said that while she wiped her vagina she saw a little bit of stain/blood – while she wiped her vagina. I knew that something had happened on her fanny (vagina)...because it had a bit red rashes".
 - (viii) The witness said that the complainant didn't tell her anything about how it had happened. The witness had thought it was normal. Thereafter, the complainant had talked to her father.
 - (ix) The witness testified that she got to know on the next day that the complainant had been sexually assaulted. This was after the complainant went with her dad to a private hospital at Martintar in Nadi.
 - (x) The witness said that (after returning home) her husband had informed her to get ready. The Doctor at Martintar had referred her daughter to Punjas Hospital in Lautoka. Accordingly, she, her husband and her children had proceeded to the Punjas Hospital in Lautoka (Punjas Health Centre).
 - (xi) At the hospital the complainant and her husband went to see the Doctor. She had remained in the taxi with her son. Later her husband came and told her that the Doctor wants to tell them something. So she too had gone to meet the Doctor. It was Doctor Konrote. The Doctor had told them that the complainant had been sexually assaulted. When she asked her daughter she had said that it was Bobby who had sexually assaulted her.
 - (xii) The witness confirmed that this was the first time she got to know that Bobby had sexually assaulted her daughter.
 - (xiii) Thereafter, she went to the Police Station with her husband and her daughter to lodge a complaint about the incident.
 - (xiv) The witness said she doesn't recall when exactly this happened (the medical examination and reporting the matter to the Police). However, she confirmed that at the time Bobby was at their home.
 - (xv) The witness identified the accused in the dock as Robert Stoman.
 - (xvi) The witness was cross-examined at length by the defence.
 - (xvii) The witness agreed that the accused was a close friend of her family and whenever he came to Fiji he used to stay with her and her family. She also agreed that the accused was a very caring person and used to bring gifts for her and her family.
 - (xviii) The witness agreed that she returned from her village (Biausevu Village, in Korolevu), after the New Year in 2019. When she returned home she agreed that Garry and the accused were staying (in the house).
 - (xix) It was suggested to the witness that by then she had information that Garry had brought prostitutes home. The witness denied this suggestion and said that she didn't know about the prostitutes (being brought home) until she confronted Bobby in prison (in the remand).

- (xx) *The witness denied that after she returned from her village that she had assaulted Garry during an argument and that this assault took place in the presence of the accused. She also denied that Garry had received injuries on his face due to this assault.*
- (xxi) *It was suggested to the witness that either she or Garry used to be swimming in the pool or sitting on the grass nearby, when her children were swimming in the pool with the accused. The witness said yes and said that they trusted the accused as he was just like an uncle to her two children.*
- (xxii) *The witness said that during the examination of the complainant at the Punjas Health Centre, in Lautoka, she was present along with her husband.*
- (xxiii) *The witness agreed that she knows Wayne, the son of the accused. She further agreed that she had been chatting with Wayne on Facebook messenger.*
- (xxiv) *The defence tendered to Court as Defence Exhibit DE1, a 25 page document, containing certain messages exchanged between the witness and Wayne on Facebook messenger, (said to be) during the period 18 January 2019 and 15 March 2019. The witness testified that her Facebook Account had the name TynaiMichelle Kay (as depicted in pages 1-16). Later she had changed her Facebook Account name to Oba Dunn (as depicted in pages 17-25).*
- (xxv) *The witness was cross-examined at length about these messages exchanged between her and Woyne.*
- (xxvi) *In re-examination the witness clarified certain answers given by her during cross-examination, including her testimony in relation to Defence Exhibit DE1.*
- (xxvii) *When asked why she was sending messages to Wayne, the witness said because she was really mad (angry) that they brought prostitutes/girls to the house. The witness agreed that this had no relation to this case (to the complaint made by the complainant against the accused).*
- (xxviii) *The witness testified that she cannot recall the exact times and dates the messages (found in Defence Exhibit DE1) were exchanged. However, she agreed that all the messages were not exchanged on the same day.*
- (xxix) *When asked why she visited the accused while he was in remand, the witness said: "I wanted to confront him if he really did that to my daughter. Because he was more than an uncle to my children". The witness said she couldn't believe that the accused would do such a thing to her daughter.*
- (xxx) *The witness testified that the complainant did not own up (open up) to her, because she was scared of the witness. The complainant was very close to her father.*

[41] Evidence of Dr. Tieri Margaret Konrote

- (i) *The Doctor testified that she is currently practicing as a Medical Officer at the Punjas Health Centre in Lautoka. She is 39 years of age.*
- (ii) *She had graduated with an MBBS Degree from the Fiji School of Medicine in 2008. She has also obtained a Diploma in Child Health from the Fiji School of*

Medicine in 2018. This Diploma is said to be the first year entry into the Master's Programme in Paediatrics.

- (iii) The witness testified that she has been practicing as a Medical Officer for the past 14 years. Prior to working at the Punjas Health Centre as a Medical Officer, she had worked as a Senior Paediatric Registrar at the Lautoka Hospital for 8 years. She specialized in child health care. She had left the Lautoka Hospital in 2018 and started working at the Punjas Health Centre towards the end of 2018. Currently she is a General Practitioner at the Punjas Health Centre.*
- (iv) The witness confirmed that she had conducted the medical examination on the complainant, MMD, at the Punjas Health Centre on 9 January 2019, commencing at 2.30 p.m. The Medical Examination Report of the complainant was tendered to Court as Prosecution Exhibit PE1.*
- (v) The Doctor stated that this was a Sexual Assault case of an underage child. The matter was reported to her from Nadi.*
- (vi) It is recorded that at the time of the examination, the complainant's mother was present. It is the complainant's father who had given consent to the doctor to conduct the said medical examination.*
- (vii) As to the initial impression of the person to be examined, column D11 it is recorded that the child was calm and cooperative during the time of the examination. The Doctor stated that for the purpose of obtaining the history (as found in column D10) she had a conversation with the complainant.*
- (viii) The Doctor testified as to the specific medical findings as found in column D12 of the Medical Examination Report. (a) The general examination was normal. (b) The hymen was intact. (c) Petechial bruising was noted along the walls of the vagina external to the hymen and labia minora on both sides. There were no lacerations or tears.*
- (ix) The doctor explained in detail as to the specific medical findings in column D12. She said that petechiae are those pin point bruises under the skin as a result of blood leaking from the capillaries (blood vessels).*
- (x) When asked as to how such bruises can be caused, the Doctor explained that there can be many reasons, including bleeding disorder or it could be due to traumatic injuries to the specific area.*
- (xi) As to her professional opinion as found in column D14, it is stated that the physical examination is consistent with the history given by the patient. In other words the examination supported the complainant's story (given in the history) about someone having poked her finger into her genitalia. The said injuries could also have been caused from a sucking action of the skin.*
- (xii) The doctor testified that based on the history the child gave plus her physical examination her conclusion was that the history was consistent with what she had found during the examination. Her summary and conclusions at column D16 confirmed this fact.*

- (xiii) *When asked as to how old the bruising was, the Doctor testified that it was consistent with the history given by the patient that it could have been within 24 hours. The Doctor further testified that petechial bruising normally heals within 2 to 3 days.*
- (xiv) *During cross-examination the Doctor confirmed that the history (as recorded in column D10) was given to her by the complainant.*
- (xv) *It was suggested to the witness that the complainant's mother was not present during the examination. The Doctor said that she cannot confirm at which time both parents were present or in what order the parents were present. However, she said that both parents were present at some point during the examination.*
- (xvi) *The Doctor testified that it was possible for the hymen of a 6 year old child still to be intact even when someone inserts the finger into (the vagina) of that child.*

[42] Evidence of Savenaca Siwatibau Waga

- (i) *The witness testified that he is 44 years of age and residing at Delainavesi in Lami. He has been serving in the Fiji Police Force for the past 16 years and holds the rank of Corporal.*
- (ii) *He is currently seconded to the Ministry of Home Affairs and Information (since the end of 2021).*
- (iii) *The witness testified that in January 2019, he was based at the Cyber Crime Unit, at CID Headquarters in Suva. He stated that since he started working in the Fiji Police Force he had been attached to the Cyber Crime Unit (from 2006 up to the end of 2021).*
- (iv) *He was the Team Leader for Digital Forensics. The purpose of Digital Forensics is to provide readable data from any data storing device for the purpose of investigation.*
- (v) *The witness said that he has a Diploma in Advanced Networking. With regard to Digital Forensics he is a Certified Computer Forensic Examiner. He has also acquired a specialized certificate in Malware (virus) investigation. He has also attained the highest level of certification in mobile devices.*
- (vi) *The witness testified that he was called to assist in the investigation into this case in relation to the devices seized. There were three devices that had been seized by the Police - 2 Samsung mobile phones and 1 Samsung Galaxy Tablet.*
- (vii) *At this stage the Learned State Counsel showed the witness a Samsung Galaxy Tablet (white in colour), a Samsung J9 (G9) mobile phone (black in colour) and a Samsung J5 mobile phone (black in colour). The witness confirmed that he had been given all three devices for investigation.*
- (viii) *When asked how he had investigated these devices, the witness said he had used the tool which enables them to extract data inside mobile devices and produce it in printed format. A machine called Cellebrite is used for this*

purpose. He connects the device to the said digital forensic machine and then extracts the information. After extraction an Extraction Report is produced.

- (ix) The Extraction Report (showing a summary of the extraction) was tendered to Court as Prosecution Exhibit PE2. The said Extraction Report contains information about the two devices which were of interest namely the Samsung J5 mobile phone and the Samsung Galaxy Tablet.*
- (x) The witness testified that all the images extracted in relation to this case were from these two devices. The first four pages of the report contains images that were extracted from the Samsung J5 mobile phone; while the rest of the images were extracted from the Samsung Galaxy Tablet.*
- (xi) During the witness's testimony, it transpired that the photos that the prosecution was relying on were all extracted from the Samsung J5 Mobile Phone. As such the said phone was tendered to Court as Prosecution Exhibit PE3.*
- (xii) A photo sheet containing the relevant photos were tendered to Court as Prosecution Exhibit PE4. Photo 1 in the said sheet was marked as PE4 (a) - it is the photo of the complainant showing her naked upper body; Photo 4 was marked as PE4 (b) - it is the photo of the complainant and Bobby together (showing only their faces) and Photo 5 was marked as PE4 (c) – it is the photo of the complainant kneeling forward on a plastic chair with her back facing the camera.*

[43] At the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that the accused had committed the offence of Indecent Assault of which he is charged with in Count 3. Accordingly, the accused was found not guilty and acquitted of the said charge. The reasons for this decision will be further elaborated upon later in this judgment.

[44] However, this Court decided to call for the defence in respect of the remaining four counts-Counts 1, 2, 4 and 5. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[45] The accused decided to testify on his own behalf. He also called Corporal 5341 Barbara to testify on his behalf.

Case for the Defence

[46] Evidence of Robert William Stoman

- (i) *The witness testified that he is 77 years old and currently residing at Ram Sami Reddy Road in Kashmir, Lautoka. He is an Australian national and now retired.*
- (ii) *The witness said that he has never appeared in any Court of Law prior to this. This case is his first appearance in Court.*
- (iii) *The witness testified that in the year 2019 he came to Fiji on holiday. He arrived on 28 December 2018 and stayed with Garry Dunn and his family. He had met Garry through a longtime friend of his named Perry Barden.*
- (iv) *The witness said that Perry Barden had passed away in early April 2018. Thereafter, he had been invited to stay at Garry's place for his funeral. The witness said this was the first time he stayed at Garry's place.*
- (v) *Garry had told him that if he came to Fiji (in the future) he could stay at their house. The witness said that when he comes to Fiji he used to bring gifts for Garry's family. He brought bottles of alcohol and cartons of cigarettes duty free. He also brought chocolates for Garry's wife and lollies for the kids. He had even gifted a J5 mobile phone to Garry's wife, Mereani.*
- (vi) *Prior to December 2018, he had stayed four times at Garry's house. Those times were in May 2018, July 2018, end of August through to September 2018 and November 2018. All his visits to Fiji are recorded in his passport.*
- (vii) *The witness testified that Garry's house has three bedrooms. Garry would stay in the main bedroom, he would stay in the second bedroom and the third bedroom was for Garry's son. The complainant would sleep mostly with her father. Garry's wife Mereani would sleep on the floor in the lounge room. Normally her son would also sleep with her.*
- (viii) *He said that the complainant would come to his bedroom and play with his Tablet. The door of his bedroom was always open. The room did not have a ceiling. It had a gable roof where the walls didn't go up to the roof. Normally he would go to sleep around 8.30 to 9.00 p.m.*
- (ix) *The witness was asked whether on any occasion the complainant slept in his room. He said that he recalls her sleeping in his room four times. She would sleep against the window/wall side of the room, while he would sleep on the door side, since he had to get up and visit the toilet frequently during the night.*
- (x) *The witness said that he considered his relationship with Garry's family to be excellent.*
- (xi) *In December 2018, Mereani and her two children were in her village. They would have returned in early January 2019. He was present when they returned.*
- (xii) *The next day Mereani had confronted Garry and accused him of having girls in the house – because she noticed her clothing had been moved from the original place. The witness continued that Mereani had got into a rage and attacked Garry and punched him. The assault was on Garry's face and body. Garry had*

suffered injuries. He was bleeding and he had a big swelling on his neck. The witness further testified that Garry went to the hospital to get his injuries checked.

- (xiii) The witness said: "She got into such a rage that she swung her arm back in anger and she smashed a plate/safety glass window on the door".
- (xiv) When asked whether Garry had said anything to him at the time, the witness testified that Garry had inferred or blamed him for telling Mereani that he had brought prostitutes home. However, the witness said that he did not tell Mereani at that time about the prostitutes being brought home.
- (xv) He said that he told Mereani about this when she came to visit him in the remand and had asked him about the prostitutes. When asked by Mereani, he had answered honestly and said yes.
- (xvi) The witness categorically denied that he inserted his finger into the complainant's private part or that he licked her private part at any time while she was sleeping in the bedroom. He also denied that he touched the complainant's private part while she was swimming in the deep end of the swimming pool. He said in the deep end he had to use both his hands to stay afloat.
- (xvii) The witness said that the swimming pool was at the rear of the house. Most of the time when the children were swimming in or both the complainant's parents would be in the pool or sitting on the grass at the end of the pool.
- (xviii) The witness testified to an incident which happened in the swimming pool. He said the complainant was sitting astride (with her legs on both sides) on a blown up airbed in the swimming pool. She was leaning backwards against the pillow of the airbed. Then her brother ran along the edge of the pool and dived on the airbed. He landed right on her pelvic area-between her legs. The complainant had yelled at him and pushed him away.
- (xix) The witness said that he is a right handed person and does everything with his right hand.
- (xx) The witness further testified that after he was remanded for this case Mereani had visited him two times at the Remand Centre. She had asked him whether he had touched her daughter and the witness had said no. Mereani had also asked him whether Garry brought prostitutes to the house. He said he had been honest and said yes. He had also suggested to Mereani not to be visiting him in the remand as she could be a witness for the prosecution and that could affect him from obtaining bail. Thereafter, Mereani had stopped visiting him.
- (xxi) The witness confirmed that he has a son named Wayne who is 45 years old. His son had visited him at the Remand Centre. The witness said that he was unaware that Wayne was chatting with Mereani on Facebook.
- (xxii) The witness said that his Samsung J9 mobile phone was taken by the Police on 9 January 2019. The phone had been returned to the witness the previous day (After the prosecution had closed its case the Learned State Counsel had returned to the accused in open Court his Samsung J9 Mobile Phone and his

Samsung Galaxy Tablet). He said the phone had been returned to him after 4 years.

- (xxiii) He had gone through his mobile phone the previous night and had found Facebook messages sent by Mereani to him (4 years ago) inquiring from him whether he has any photos of the injuries suffered by Garry as a result of her assault on Garry. The defence tendered to Court as Defence Exhibit DE2, a 5 page document, containing certain messages exchanged between the witness and Mereani on Facebook messenger.*
- (xxiv) The witness said that at the time he had received the above messages he had been residing at Garry Dunn's residence. He said this would have been on 8 January 2019.*
- (xxv) The witness was asked as to the reason these charges were laid against him. He answered as follows: "Basically he (Garry) blamed me for telling his wife about the prostitutes and his enmity/animosity with me. To get even".*
- (xxvi) The witness was cross-examined at length by the Learned Counsel for the State and the prosecution case theory was put across to him. However, the witness consistently denied the allegations made against him by the complainant.*

[47] Evidence of Corporal 5341 Barbara

- (i) The witness testified that she is 38 years old and residing at Vomo Street, Lautoka. She is currently serving at the Prosecution Office of the Lautoka Police Station.*
- (ii) She has been serving in the Fiji Police Force since 2007 – for over 15 years. In 2019 she was serving as a Woman Detective Constable (WDC). She had been promoted as a Corporal in August last year.*
- (iii) The witness confirmed that in the year 2019, she was stationed at the Lautoka Police Station and based at the CID Branch. Her unit was specifically dealing with Sexual Offence cases.*
- (iv) The witness said that on 9 January 2019, the complainant and Garry Dunn had come to the Lautoka Police Station to lodge a report. Since this was a Sexual Offence case, they were referred to her unit. She confirmed that she had recorded the statements of the complainant and Garry Dunn on the said day.*
- (v) The witness testified that she had recorded everything said by the complainant and Garry Dunn. She said she had recorded the statements efficiently and that she had conducted her duty professionally while recording the statements.*
- (vi) The witness denied that she was busy and concentrating on other things while taking the two statements. She said that after recording the two statements, she had read back the two statements to the complainant and Garry Dunn.*

Analysis

- [48] As stated before, the prosecution, in support of their case, called the complainant (MMD), her father Garry Raymond Dunn, her mother Mereani Naioba Dunn, Dr. Tieri Margaret Konrote and Police Officer, Savenaca Siwatibau Waqa. The accused decided to testify on his own behalf and also called Corporal 5341 Barbara to testify on his behalf.
- [49] 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 10, 11, 12, 19 and 26 of this judgment, in respect of the five counts.
- [50] 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.
- [51] Based on the said admitted facts it is admitted that the complainant was residing at Lot 57 McElrath Street, Mountain View, Nadi and was 6 years old at the time of the alleged offending. It is also admitted that accused was a good friend of the complainant's father Garry Dunn. It is also admitted that when visiting Fiji since May 2018, the accused used to stay with the complainant's family. Therefore, the identity of the accused is not in dispute, as he was well known to the complainant and her family.
- [52] The complainant's date of birth is 31 August 2012. Thus at the time of the incidents alleged, the complainant was only 6 years old, and a child under the age of 13 years. At the time she testified in Court she was 10 years of age.
- [53] Therefore, with regard to the three charges of Rape, the primary issue of dispute in this case is the physical act, namely whether the accused penetrated the vulva of MMD, with his tongue, in respect of Count 1; whether the accused penetrated/touched the vagina of MMD, with his fingers, in respect of Count 2 and whether the accused penetrated the vagina of MMD, with his finger, in respect of Count 4.

- [54] In respect of the third count of Indecent Assault, the primary issue of dispute would be whether the accused unlawfully and indecently assaulted MMD, the complainant, by touching her buttocks.
- [55] In respect of the final count of Pornographic Activities Involving Juveniles the primary issues of dispute are that the accused either in public or in private; directly or indirectly; took photographs or made video recordings of pornographic activities involving the complainant. The fact that she is a Juvenile is no longer a dispute as it is agreed that the complainant was 6 years old at the time of the alleged offending.
- [56] I have summarized the evidence of all witnesses led during the trial.
- [57] During her testimony the complainant did not come out with any evidence in relation to Count 3. In the circumstances, at the end of the prosecution case, this Court decided that there was no relevant or admissible evidence to establish that the accused had committed the offence he is charged with in Count 3. Accordingly, the accused was found not guilty and acquitted of the said charge. However, this Court decided to call for the defence in respect of Counts 1, 2, 4 and 5.
- [58] 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 by her father Garry Dunn due to the accused having informed Garry's wife that he had brought prostitutes to the house during her absence. The accused's position is that Garry had an enmity or animosity with him due to this factor and wanted to get even with him.
- [59] However, it is very clear from the testimony of Garry Dunn and his wife Mereani that the first occasion on which Mereani came to know about the prostitutes being brought home by Garry was when she had visited the accused at the Remand Centre. Even the testimony of the accused is that he told Mereani about the prostitutes being brought home by Garry only when she came to visit him at the Remand Centre and had asked him about the prostitutes.
- [60] This incident of sexual abuse had been reported to the Police on 9 January 2019. Pursuant to the report, the accused had been taken into custody. It is an Admitted Fact that the accused was caution interviewed at the Lautoka Police Station on 10 January

2019. He had been produced in the Magistrate's Court of Nadi and remanded in custody only thereafter.

[61] Therefore, it cannot be true that Garry Dunn had any enmity or animosity against the accused as a result of the accused informing Mereani about him bringing prostitutes home, at the time he had taken the complainant to the Lautoka Police Station to report the matter on 9 January 2019.

[62] It must also 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, between 1 June 2018 and 9 January 2019. Therefore, it is the opinion of this Court that it is highly unlikely for the complainant, who was merely 6 years old at the time, or for her father, to make up or manufacture such a sequence of events against the accused, unless the incident really took place.

[63] While testifying to the incident which took place in the swimming pool the complainant said that the accused touched her private part with his left hand-with his fingers. The accused takes up the position that he is a right handed person. He also submits that while swimming in the deep end of the swimming pool he had to use both his hands to stay afloat. However, it is the opinion of this Court that neither of this would necessarily have prevented the accused from penetrating the vagina of the complainant while in the swimming pool as stated by her.

[64] Therefore, considering the totality of the evidence in this case, it is my opinion, that the defence version cannot be accepted as truthful and reliable, and as such, I reject the defence version.

[65] The complainant's father, Garry Dunn, was the recent complaint witness. He testified that the complainant had told her that Bobby was touching her inappropriately. Then she mentioned that she had passed a little bit of blood from her vagina and had a sore tummy. Also she mentioned that when she woke up she found Bobby licking her vagina and he had digitally put his fingers in her vagina.

[66] The witness said that at the time he had been in complete shock on hearing this because of the friendship Bobby and he had. He couldn't even imagine anything like that happening

and he had told the complainant that if anything else happened (in the future) to tell him straight away. The witness testified that on the 9 January 2019, the complainant had complained to him a second time that Bobby had touched her inappropriately again. Thus, he took the complainant to their local GP at Martintar.

[67] The above 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.

[68] 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.

[69] The Defence attempted to impeach the complainant's credibility during her cross examination by stating that the complainant did not complain of the incidents to her parents immediately as it happened.

[70] I agree that the complainant only reported the matter to her father on a later date and only thereafter was the matter reported to the Police (on 9 January 2019).

[71] However, this Court is conscious of the fact that children do not always react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned.

[72] The complainant has clearly testified to the reasons for not reporting the matter to any family member earlier. She said she did not scream or shout when the incidents were happening because the accused had told her that he would buy her the stuff that she wanted. The complainant's father Garry Dunn testified that when he had asked the complainant as to how long the accused had been perpetrating these acts on her, she had said many times when the accused would stay with them. The complainant had said that

she did not say anything to him earlier since the accused made her to do a 'pinky promise' (which the witness had taught her for not telling lies). Garry Dunn explained further that the accused would have made a 'pinky promise' for her not to tell Mummy and Daddy, if not she will get into trouble.

- [73] In the circumstances, I am satisfied with the complainant's explanation for the delay in reporting the matter.
- [74] The defence also attempted to impeach the complainant's credibility by highlighting certain omissions in her statement made to the Police on 9 January 2019, in comparison to the testimony given by her in Court. Similarly, the defence attempted to impeach the credibility of witness Garry Dunn by highlighting one contradiction and certain omissions in his statement made to the Police on 9 January 2019, in comparison to the testimony given by her in Court. I have identified and made reference to the said omissions and inconsistency when summarizing the complainant's and Garry Dunn's evidence.
- [75] In *Sivoinatoto v. State* [2018] FJCA 68; AAU0049.2014 (1 June 2018); the Fiji Court of Appeal discussed as to how a Court should deal with issues arising out of contradictions and omissions.
- [76] When asked to explain as to why there were omissions in their Police statements, both the complainant and Garry Dunn said that when the Police were recording their statements they did not ask those questions. Garry Dunn went on further to state that that he believes that the lady Police Officer who took his statement was very busy and tired and the recording was not done professionally or properly. He testified that he had told the Police about all what the complainant had told him. He said further that he cannot explain why she did not record what he said. It may have been due to her inefficiency.
- [77] In this case, the complainant's statement and Garry Dunn's statement was recorded by Corporal 5341 Barbara, on 9 January 2019. Corporal Barbara was called as a defence witness. She testified that she had recorded everything said by the complainant and Garry Dunn. She said she had recorded the statements efficiently and that she had conducted her duty professionally while recording the statements. Corporal Barbara denied that she was busy and concentrating on other things while taking the two statements. She said that

after recording the two statements, she had read back the two statements to the complainant and Garry Dunn.

[78] With regard to the recording of the complainant's statement, it is recorded that the time of commencement of the statement is 16.34 hours and the time of completion is 17.10 hours. It is clear from this that the recording of the statement took 36 minutes. The statement contains merely 14 lines (typed lines). It must be borne in mind that the complainant had come to the Police to report on a sequence of events or a series of acts which the accused perpetrated on her between a period of over 6 months.

[79] Similarly, with regard to the recording of Garry Dunn's statement, it is recorded that the time of commencement of the statement is 17.18 hours and the time of completion is 17.41 hours. It is clear from this that the recording of the statement took 23 minutes. The statement contains four paragraphs (16 typed lines). This statement would have been recorded soon after the completion of the recording of the complainant's statement (within 10 minutes).

[80] It is clear when reading the two statements that Corporal Barbara had not made any endeavour to probe for further information from the complainant or Garry Dunn so as to obtain the full narrative of the incident. As such, I cannot agree with her testimony that she had recorded the statements efficiently or that she had conducted her duty professionally while recording the said statements.

[81] For these reasons, I am of the opinion that the reliability and credibility of the complainants' evidence and Garry Dunn's evidence remains unaffected.

[82] I believe that this is an appropriate time to comment on this matter further. This Court has been observing with grave concern the manner in which the Police Department has been conducting investigations into cases, specifically with regard to the substandard manner in which the statements of victims of crime are recorded. In particular victims of sexual offences.

[83] It is trite law that in the Common Law jurisdiction, Police statements (which can be considered as previous statements made by a witness) can be utilized not for corroboration but for highlighting of inconsistencies/contradictions or omissions.

- [84] I will not delve into the issue of inconsistencies at this point in time. However, I find that in most instances the statements made to the Police by victims of crime (particularly victims subjected to sexual offences) does not contain material information of the alleged incident or in other words does not contain the full narrative of the alleged incident.
- [85] I need not emphasize the fact that the initial statements recorded by Police during the course of the investigation, becomes the basis on which further investigations are conducted in the case. Therefore, it is of paramount importance that such statements should be properly and duly recorded. The first information, as it is referred to in many jurisdictions, could make or break the case for the prosecution.
- [86] Therefore, every Police Officer/Investigating Officer must always bear in mind that the first statement that is recorded could potentially end up in criminal proceedings being instituted either in the Magistrate's Court or the High Court. They should not treat the recording of the statement as a mere run-of-the-mill Police duty or task which needs to be completed in haste.
- [87] They should always bear in mind that the victims of crime are already traumatized by the incident they are complaining of and their frame of mind at the time. This is more so when it comes to recording statements of victims who have been sexually abused.
- [88] In most instances, these victims may be coming to the Police Station to report the matter with much reluctance and trepidation. Therefore, it is incumbent on the Police to ensure that they elicit from the witness the full narrative of the incident.
- [89] The Police should not merely record what the victim says but should probe for further information. This does not mean, and I emphasize on this, that the officer recording the statement should not add things on his own, but he or she must make every endeavour to obtain the full narrative of the incident from the victims themselves.
- [90] A failure to do so would result in the victim being pulverized in Court during his or her cross-examination. In certain instances, the majority of the cross-examination is based on highlighting of omissions in the Police statement, vis-à-vis the witness's evidence in Court.

[91] When asked to explain why these omissions exist in the statement, the witness usually would say either of the three things:

1. That he/she mentioned this to the Police but it is not recorded.
2. That they were never asked for such information by the Police.
3. That he/she genuinely may have forgotten to mention these matters in the statement.

[92] A proper recording of the statement could have prevented such a scenario from taking place.

[93] It is also imperative that the statement, irrespective of how lengthy it may be, to be read over to the victim at the conclusion of his recording, before he or she signs the statement. It is not an excuse to say that when the victim was asked if he or she requires the statement to be read over to him/her that they had said, it is not necessary. It is an obligation on the Police Officer or Investigating Officer to read the statement over in its entirety and to ask if he/she wishes to add or alter any portion of the statement.

[94] I urge the DPP to bring this to the notice of the relevant authorities so that at least in the future there will be an improvement in the manner in which statements of victims of crime, especially victims of sexual abuse, will be recorded.

[95] I must add that I see this trend more prominent in investigations carried out in the Western Division. I find that in the Central Division the recording of statements were carried out marginally better.

[96] Coming back to the instant case, the prosecution also led the evidence of medical officer, Dr. Tieri Margaret Konrote. The copy of the Medical Examination Report pertaining to the medical examination conducted on the complainant was tendered to Court as Prosecution Exhibit PE1.

[97] As to her professional opinion, the medical officer stated that the physical examination conducted by her was consistent with the history given by the patient. In other words the examination supported the complainant's story (given in the history) about someone having poked her finger into her genitalia or having being caused from a sucking action of the skin.

[98] For all the aforesaid reasons and having analysed all the evidence in its totality, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charges of Rape with which the accused is charged in Counts 1, 2 and 4.

[99] With regard to Count 5 which is the charge of Pornographic Activities Involving Juveniles, the defence submitted that the count is defective since it is stated in the Statement of Offence that the charge is one in terms of the Juveniles Act Chapter 56. The defence position is that reference to Chapters is no longer applicable or valid.

[100] However, it is opinion of this Court that this objection is without merit. The Statement of Offence clearly makes reference to Section 62A (1) (b) of the Juveniles Act. Judicial Notice can be taken that the Juveniles Act means Act No. 13 of 1973, as amended by the Juvenile (Amendment) Act No. 29 of 1997. Therefore, this objection is rejected.

[101] With regard to Count 5 the prosecution should prove beyond reasonable doubt that the accused either in public or in private; directly or indirectly; took photographs or made video recordings of pornographic activities involving the complainant. Section 62A (12) of the Juveniles Act provides that: *“pornographic activity” includes activity which is either indecent or obscene, or in any way judged by the standards of the time, is of a sexual nature and offensive.*

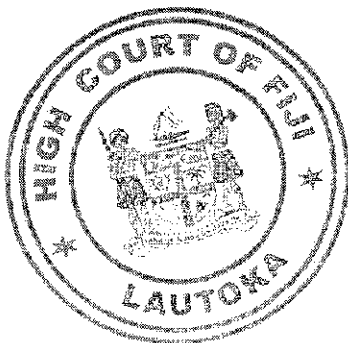
[102] This Court is satisfied that two of the photographs in the photo sheet containing relevant photos, which were tendered to Court as Prosecution Exhibit PE4 - namely Photo 1 in the said sheet which was marked as PE4 (a) - the photo of the complainant showing her naked upper body and Photo 5 which was marked as PE4 (c) – the photo of the complainant kneeling forward on a plastic chair with her back facing the camera, are photos which are either indecent or obscene or is of a sexual nature and offensive.

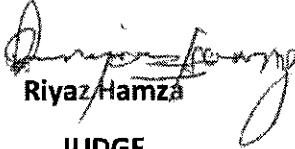
[103] This Court is satisfied that the said photographs were taken by the accused using his Samsung J5 Mobile Phone, which has been tendered to Court as Prosecution Exhibit PE3.

[104] For all the aforesaid reasons and having analysed all the evidence in its totality, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charge of Pornographic Activities Involving Juveniles, with which the accused is charge in Count 5

[105] In the circumstances, I find the accused guilty of the charges of Rape with which the accused is charged in Counts 1, 2 and 4 and Pornographic Activities Involving Juveniles with which he is charged in Count 5.

[106] Accordingly, I convict the accused of the charges of Rape with which the accused is charged in Counts 1, 2 and 4 and Pornographic Activities Involving Juveniles with which he is charged in Count 5.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 4th Day of May 2023

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

Solicitors for the Accused: Messers Iqbal Khan & Associates, Barristers & Solicitors,
Lautoka.

