IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 57 OF 2020

THE STATE

v.

APENISA CUQU

Counsel: Ms S. Naibe for State

Ms K. Vulimainadave with Mr R. Filipe for Defence

Dates of Hearing: 13, 14 & 20 September 2023

Date of Judgment: 05 October 2023

(Name of the Complainant is suppressed. She is referred to as AL)

JUDGMENT

1. The accused, Apenisa Cuqu is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act. The Prosecution alleges that the accused on 7 March 2020 at Vatukacevaceva Village, Rakiraki, in the Western Division penetrated the vagina of AL a child under the age of 13 years, with his finger.

2. The accused pleaded not guilty to the charge. At the trial, the Prosecution presented the evidence of five witnesses. At the end of the Prosecution case, the accused was put to his defence. The accused opted to exercise the right to remain silent. The Court heard oral submissions from both counsel in addition to the written submissions they filed. Having carefully considered the evidence presented at the trial, and the submissions, I now proceed to pronounce my judgment as follows.

3. The prosecution bears the burden to prove all the elements of the offence. That burden must be discharged beyond a reasonable doubt. The burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused shall prevail until the charge is proved beyond reasonable doubt.

4. The Prosecution must prove that the accused penetrated the vagina of the complainant. A slightest penetration is sufficient to prove the element of penetration. Consent as defined by Section 206 of the Crimes Act means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent. A person under the age of 13 years is considered by law as a person without the necessary mental capacity to give consent. The complainant in this case was 2 years of age at the time of the alleged offence and therefore, she did not have the capacity under the law to consent. So, the Prosecution does not have to prove the lack of consent on the part of the complainant.

5. Let me now summarise the salient parts of the evidence led in trial.

PW 1- AL (The Complainant)

6. AL was two years old at the time of the alleged offence. The English translation of the statement alleged to have been given by the complainant to the police on 8 March 2020 was read in evidence-in-chief pursuant to Section 134 (1) and tendered it as PE 1. I shall reproduce the statement as follows:

Question 1: What is your name? Answer is blank.

Question 2: Iyei na ulumu? Answer: Dusia na Uluna.

Question 2: Show me your head? Answer: Touched her head.

Question 3: Ivei na Ligamu? Answer: Vakaraitaka na ligana, dodokamai.

Question 3: Show me your hand? Answer: Stressed out her hand.

Question 4: Ivei na matamu? Answer: Vakawidria main a matana.

Question 4: Show me your eyes? Answer: Rounded her eyes. (Widened her eyes).

Question 5: Ivei ko Tinamu: Answer: Dusi Tinana dabe tiko e yasana.

Question 5: Where is your mother? Answer: Pointed at her mother as she sat beside her.

Question 6: Iko kana cava tiko? Answer: Bongo ka Lailai.

Question 6: What are you eating? Answer: Small bongo.

Question 7: Ivei o Masila? Answer: Sa reva.

Question 7: Where is Masila? Answer: He is missing.

Question 8: Cava cakava vei iko o Masila? Answer: O koya na polo

Question 8: What did Masila do to you: Answer: His ball. (He is the ball)

Question 9: Na polo cava? Answer: Dusia na nona mimi.

Question 9: What ball? Answer: Pointed at her vagina.

Question 10: Cegu vakalailai ni sa via moce. Soli tiko na Bongo kei na Juice yacova ni sa moce.

Question 10 – At 1 pm the recording of statement suspended for AL to have a rest and sleep the same time having her bongo and a juice.

1615 hours: Tekivu tale na vatarotarogi e Vatuka.

1615hrs : Recording of statement continued at victim's residence at Vatukacevaceva Village.

Question 11: Ivei o Masi? Answer: Sa reva.

Question 11: Where is Masi? Answer: He is missing.

Question 12: Na cava ara o Masi? Answer: Na polo.

Question 12: What did Masi do to you? (What did Masi touch?) Answer: The ball.

Question 13: O koya ara evei vei iko? Answer: Na rumu ya. Dusia na rumu.

Question 13: Where did Masi do this to you? Answer: That room pointed to the room where Apenisa took her to.

Question 14: Iko agi se wara? Answer: Kurea na uluna.

Question 14: Did you cry or not? Answer: Nod her head. (Shook her head)

Question 15: Ocei luvata nomu arausese? Answer: Masila.

Question 15: Who removed your long pants (trousers) from you? Answer: Masila.

7. Before the probative value of this piece of evidence is analysed, I must be satisfied that this statement should be admitted to evidence under Section 134 of the Criminal Procedure Act.

8. The relevant parts of the Section 134 reads as follows:

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.

9. The parties agreed before the hearing that the statement could be tendered in evidence. Therefore, the requirements under Section 134(2) (c) and (d) shall not apply but the conditions under (a) and (b) above must still be fulfilled. Under 134 (2) (a), the statement must have been signed by the person who made it. It is obvious that a two year old toddler could not be expected to sign such a statement. The complainant's mother and the officer who recorded the statement admitted that it was not signed by the toddler but by her mother. A declaration required to be made under Section 134(2)(b) is not present in the statement and it is obvious that such a declaration could not be expected from a toddler. Therefore, on the face of the section, the statement purport to be tendered by the Prosecution cannot be tendered in evidence because the mandatory requirements in Section 134 are not met.

10. If all the conditions in Section 134 are applied to the letter, no toddler is safe in Fiji so far as sexual offences are concerned. That is that it may well result in many guilty people not being prosecuted or being acquitted if they are. The independent evidence implicating the culprit in the sexual abuse of a child will very often not exist. It will invariable be the child's word against that of the accused. Therefore Section 134 of the Criminal Procedure Act in my opinion should be read to give effect to the spirit of supreme law of the land, the Constitution, where in Section 41(2) dictates that the best interests of a child are the primary consideration in every matter concerning the child.

11. However, the decision whether a statement of a toddler should be admitted in to evidence pursuant to Section 134 of the Criminal Procedure Act should depend on the circumstances of each case and be left with the judicial officer presiding over the matter.

12. In this case, the child complainant was present in Court and the statement was read aloud in her presence. The Defence was given an opportunity to cross-examine her, if they wished to do so, but that right was not exercised. Having carefully considered all the evidence led in this trial, I find this case to be a fit case to allow the Prosecution to read the statement of the complainant in evidence despite all the conditions under Section 134 (2)(a)(b) are not fulfilled. (I shall further delve into this subject in the analysis part).

13. Having allowed the statement (PE1) to be admitted in to evidence, I now proceed to analyse other evidence led in this trial.

PW 2 Ikinesi Natagane

14. Ikinesi is a single mother. In 2020, she was residing at Vatukacevaceva in Rakiraki with her parents, Apenisa Cuqu, her nephew, her sister Vasenai Raika and her three kids. Her eldest son, Ratu Orisi, was 6 years old. AL was born on 17 November 2017. AL is now 5 years old. Apenisa Cuqu's father is Ikinesi's brother. Apensia was raised with her siblings in the same house. Ikinesi's children used to call the accused Masila. AL used to call him Masi.

15. On 7 March 2020, at around 2 p.m., Ikinesi went to Rakiraki Town, leaving her children with Vasenai, her younger sister. Apenisa Cuqu was also home with them. When she returned home at around 11 p.m., her sister Vasenai told her about what Masi had done to AL.

16. Vasenai informed Ikinesi that when she was sitting outside, she saw Apenisa and AL playing inside the house. The light on the porch was suddenly switched off. She felt the need to go inside and check. When she came inside the house, AL was lying on the floor with no pants. Apenisa was sitting on the bed, wearing only a towel. When Apenisa saw

Vasenai, he was shocked. AL ran to Vasenai. Vasenai then asked AL what had happened. AL told Vasenai that Masi touched ('Masi, ball') her. AL hugged her. When she hugged, AL cried and was in a state of shock, only By the time she returned home at around 11 p.m., Apenisa had gone missing from home. Her mother told her to report the matter.

17. Ikinesi said that when she heard about this incident, she wanted to do something to Apenisa. When the Court inquired if she spoke to AL, the witness said that AL took a while, and then said 'Masi ball me'. She further said that during conversations on a normal day, AL would say some words like 'Ta', meaning dad. 'Na' meaning Mum and 'au', meaning me.

18. Apenisa returned home the next day. She told Apenisa that he had touched AL and that what he did to AL was not right. Before this incident, she had a good relationship with Apenisa. He was a good person, and he loved the kids. After the matter was reported, the relationship became bitter.

19. Ikinesi reported the matter to Rakiraki Police Station the following day (8 March 2020). After reporting the matter to the police, she took AL to Rakiraki Hospital where AL was examined by a doctor.

20. When AL's statement was being taken by the police, Ikinesi was present with Mela and Vasenia. AL was given some snacks so that she could speak. AL then spoke and mentioned that 'Masi ball me'. When she asked what 'ball' means, AL pointed to her vaginal area.

21. Under cross-examination, Ikinesi admitted that she did not tell the police that Vasenai had told her that Apenisa was playing inside the house with AL on the night of 7 March 2020.

22. Ikinesi denied answering the questions being posed to AL by the police. She denied that her mother was not happy that Apenisa was staying in that house. She admitted that

Apenisa had an injury and swelling during the period the alleged incident occurred. One Sireli Rale and one Meli Nacavalia used to come to help him. She agreed that AL used to call Apenisa, Masi. She agreed that when AL did not answer the question, *where is Masi?* she gave the answer on AL's behalf. Ikinesi agreed that the answer *'o koya na polo.'* (Masi ball polo) and questions *'I vei o Masi'* (*where is Masi?*) and *'a cava ara o Masi'* (what did Masi touch?) were posed by her. She agreed that she signed the statement on behalf of her daughter. She agreed that Amani, the police officer, who had recorded the statement is related to her.

23. Under re-examination, Ikinesi said that she had to give answers on behalf of AL because AL was not speaking enough, was not fluent in speaking and remained silent. She gave those answers because when she arrived home, AL had told her what had happened to her.

PW 3: Doctor Ilisapeci Adi Tabua

24. Doctor Tabua medically examined AL at Rakiraki District Hospital on 8 March 2020 at 11.15 a.m. and filled in a Fiji Police Medical Examination Form. She tendered her report marked as PE 2. AL's mother, her aunty and a female nurse were present during the examination. AL appeared stable and comfortable, but she was a bit shy and wasn't talking much.

25. Upon examination of AL's genital area, the doctor noted abrasions on the left *labia minora*. AL's hymen was not intact. At the vaginal orifice, she noted some discharge or fluid that was foul-smelling. In her opinion, those injuries or abrasions could be caused by trauma or by anything that irritates the skin. She also noted *Arithmatus*, an unusual discolouration, was found on the skin or on the mecusol membrane. Any form of forceful trauma or penetration into the vaginal orifice could break the hymen. If she had fallen or landed awkwardly on the ground or if she was horse riding or riding a bicycle, it would be possible for her to break the hymen. The foul-smelling could have been caused by an infection. All the injuries were of recent origin.

26. Those injuries could have been caused by any foreign object like a finger, or a stick, that could penetrate the hymen. She opined that the injuries she noted could have been caused by penetration of the vagina with a finger.

27. Whether those injuries were normal for children at her age, would depend on how active the child was. But for the foul-smelling vaginal discharge to be present in a 2-year-old would not be normal.

28. Under cross-examination, the doctor admitted that she forgot to record her medical opinion in the report.

PW 4: Vasenai Raika

29. In 2020, Vasenai was residing at Vatukacevaceva with her father, her sister- Ikinesi Natagane, Ikinesi's children and Masi (Apenisa Cuqu). Apenisa is her nephew, her brother's son.

30. At around 2 p.m. on 7 March 2020, Ikinesi went to town. She was home with Masi, Ikinesi's children and Apenisa. At around 9 p.m., she was sitting outside with her friend Mela at the mango tree. Apenisa was sitting on the porch. Her mother was sleeping with AL's other siblings. Suddenly, the light on the porch was turned off, so she came home and opened the door at the entrance. AL came to her from the room where Apenisa was. AL was only wearing a T-shirt with nothing at the bottom. When she entered the room, she saw Apenisa lying down in the room wearing only a towel. She then asked Apenisa, what had happened. Apenisa did not say anything. She asked that question because AL was not wearing anything at the bottom. Then AL said *Masi, Polo, Vesi, au;* (Masi ball me). She hugged AL. She said that Fijians have different names to describe their private area. Some would call it '*vesi*'. To her understanding, AL was referring to her vaginal area when she said '*vesi*'. AL used to call Apenisa, Masi. There was light in the sitting room, but there was no light in the room or the porch. The door at the entrance to the house is right opposite the door of Apenisa's room.

31. At around 11 p.m., AL's mother Ikinesi arrived home. She informed Ikinesi of what had happened. Apenisa was not home when she relayed the matter to Ikinesi. On the following morning, they went to the police station. The relationship between her and Apenisa at that time was very good. The relationship is still the same.

32. Under cross-examination, Vasenai said that she could not recall if Apenisa had an injury in March 2020. She denied that her mother was not on good terms with Apenisa. AL used to wear trousers at night. That night also AL was wearing trousers prior to the incident. She denied that AL did not utter the words *Masi, Polo Vesi, au,* and denied that those words were her own words. She went to the Rakiraki Police Station on 8 March 2020 with AL and her mother but was not present when AL's statement was being recorded.

PW 5: Amani Waqetia

33. On 9 and 10 March 2020, Corporal Amani interviewed the accused in English at the Rakiraki Police Station. It was conducted on a computer to which the accused agreed. After conducting the interview, the accused was asked to read the content of the interview on the screen before a printout was obtained. When the printout was obtained, the accused again read the contents and signed each page of the record of the interview voluntarily. The accused did not want him to alter or change any of his answers at any time. All the answers were given by the accused. He never fabricated any of the answers.

34. The original record of caution interview of Apenisa Cuqu was tendered in evidence marked as PE 3. There was no witnessing officer present during the interview which was conducted in the briefing room. The accused was seated with him close to each other facing the screen of the computer while conducting the interview.

35. The interview was conducted in the English language because it was the language preferred by Apenisa. Apenisa had received education up to Form 7. Apenisa answered all the questions voluntarily. He never forced, intimidated or assaulted the accused before

or during the interview to get answers. No promise or inducement was offered to answer the questions. Apensia was cautioned, and the rights of an accused were given to him. Sufficient breaks were given to Apenisa to rest.

36. On the second day of the interview, Apenisa was taken for a scene reconstruction. Before, during or after the interview, he received no complaint from Apenisa. During the scene reconstruction, Apenisa cooperated and pointed to the place where the alleged offence took place which he photographed on his phone. He pasted the photographs on the record of the interview and showed them to the accused during the interview.

37. Apenisa at Q.15 did not want to exercise his right to counsel. However, during the lunch break at Q.98, Apenisa was given an opportunity to consult a legal counsel from the Legal Aid Commission. Apenisa had a consultation with the counsel freely. Apenisa did not want to change any of his answers or make any complaints after the consultation. He highlighted in bold letters the questions and answers from 82 to 87 because that was where Apenisa had made admissions.

38. Both Apenisa and the complainant were related to him. Apenisa is his cousin. Therefore, Apenisa was comfortable with him at the interview. Apenisa agreed to him to be the interviewing officer. Apart from being the interviewing officer, he recorded the statements of the witnesses, including that of the complainant.

39. Under cross-examination, Corporal Amani explained why he called a legal counsel at Q 98, although Apenisa did not wish to exercise that right at the beginning of the interview. When Apenisa made admissions, he thought it fit to call a legal practitioner from the Legal Aid Commission so that Apenisa could be advised whether to alter or add anything to his answers.

40. The witness agreed that the complainant had never used the words vagina or penis in her statement although he at Q 73 asked Apenisa about those words at the interview. He said

he asked those questions based on the complainant's answers to questions 8 and 9 of her witness statement. He asked question 74, to follow up with question 73.

41. He recorded the exact answer given by Apenisa to question 81 that AL's vagina has been injured. Corporal Amani agreed that the photographs were taken from his phone because the official police photographer was based in Lautoka. The Investigating Officer and WDC Litia accompanied him to the crime scene where the photographs were taken.

42. He denied that, as per the time frame mentioned in the record of the caution interview, it was impossible for him to type the questions and answers in such a short period of time. He admitted that the fact that the caution interview was printed out for Apenisa to read is not stated in the record of the interview. He denied that after the break, answers 59 onwards were not given by Apenisa. He denied that the answers from 59 onwards till the end were fabricated by him.

43. He denied that the answers recorded in the complainant's statement consisted of his interpretations and not what was stated by the complainant. He said that, when the complainant uttered the words *Masi ball*, she was pointing to her vagina and her body language showed that something was done to her private part. He denied that the answers were given by the mother of the complainant. He agreed that only the mother had signed in the complainant's statement.

44. He denied that he should not have recorded the witness statements as the interviewing officer. Since he is related to the accused as well as to the complainant, he was chosen to be the interviewing officer.

Evaluation /Analysis

45. It is the case for the Prosecution that the accused penetrated the vagina of the complainant with his finger. The lack of consent on the part of the complainant is not an

issue in this case as the complainant was below the age of 13 years at the time of the alleged offence.

46. This is an exceptional rape case where the child complainant (complainant) did not give evidence in Court. A statement alleged to have been given by the complainant to the police was allowed to be read in evidence under Section 134 of the Criminal Procedure Act. If the statement is admitted as evidence, it will still be regarded as an unsworn evidence of a child.

47. It is trite law in Fiji that no corroboration of the complainant's evidence is required to prove a charge of a sexual nature. That applies to children in the same way as it does for adults despite Section 10(1) of the Juveniles Act. The Supreme Court in Kumar v State [2016] FJSC 44; CAV0024.2016 (27 October 2016) authoritatively laid down the law in Fiji as follows:

> That the law treats child witnesses differently from adult witnesses cannot be denied: section 10(1) applies only to child witnesses and not to adults. The question is whether the difference in treatment between the evidence of adults and children serves a legitimate purpose. The purpose of requiring corroboration of a child's evidence is to ensure that the defendant is not convicted on evidence which may be unreliable. Goundar JA thought that this was an illegitimate purpose because there was no basis for thinking that the evidence of a child was more likely to be unreliable than that of an adult, and that was where Calanchini P disagreed with him. But even if Calanchini P's view is to be preferred, the need for the evidence of a child to be corroborated is outweighed – in my view by a considerable margin – by the disadvantage of such a rule. That is that it may well result in many guilty people not being prosecuted or being acquitted if they are. As Goundar JA rightly said, independent evidence implicating a defendant in the sexual abuse of a child will very often not exist. It will invariably be the child's word against that of the defendant. So long as there is a rule requiring that a child's unsworn evidence be corroborated, children will be less protected from sexual abuse. The constitutional imperative in section 41(1) (d) of the Constitution will be thwarted, and the legislature will be treated as regarding the defendant's right to a fair trial as its "primary consideration", whereas its primary consideration, critically important though a defendant's right to a fair trial is, should be the best interests of the child. So although the rule requiring that the unsworn evidence of a child be corroborated serves a purpose which Calanchini P regards as legitimate, that purpose ceases to be legitimate when balanced against the need to protect children from sexual abuse. Accordingly, I would declare that the requirement in section 10(1) of the Juveniles Act for the unsworn evidence of a child to be corroborated is inconsistent with the Constitution and is

therefore invalid. For that reason, the trial judge's direction to the assessors that corroboration of the girl's evidence was not required was correct.

48. What is the position when the complainant herself gives no evidence at all in court? Can a charge of rape be proved in the absence of the complainant's unsworn evidence tendered by virtue of Section 134 of the CPC? These are the interesting questions to be answered in the course of this judgment in the context of an alleged sexual offence in relation to a toddler.

49. According to Bench Book on Children (Fiji), children under the age of 3 years are defined as infants and toddlers. Toddlers are physically dependent on others for their basic needs and are not yet able to communicate their feelings and thoughts verbally. They have limited ability to tell right from wrong, and truth from lie. (p14)

50. The complainant was only two years old at the time of the alleged offence. The Prosecution found it difficult to make the complainant speak in Court due to her bashfulness and tender age. In the absence of any objection by the Defence, the statement alleged to have been given by the complainant to the police was allowed to be read in evidence in the presence of the complainant under Section 134 (6) of the Criminal Procedure Act read with Section 41(2) of the Constitution. The right to cross-examine was afforded to the Defence.

51. The Prosecution relies on the confession made by the accused in his caution interview and the circumstantial evidence, including the complainant's medical report and the recent complaint evidence. The accused completely denies the allegation and blames police fabrication.

52. There is no dispute that the accused was staying in the same house as the complainant and her family at the time of the alleged incident. It is also not disputed that the accused is the cousin of the complainant and that the complainant used to call the accused 'Masi'

or 'Masila'. There is no evidence that no adult male was present at home at the time of the alleged offence other than the accused.

53. According to the alleged statement (PE1), the complainant had never told that the accused penetrated her vagina with his finger. All that can be gathered from the statement tendered in evidence is that 'Masi, ball me'. When the complainant was questioned about the whereabouts of Masila, her answer was that 'he is missing' (Q7). When being asked- What did Masila do to you? her answer was 'his ball' or 'he is the ball' (Q 8) and when asked what did Masi do to you?(What did Masi touch?), her answer was: the ball. (Q12) When she was asked to describe the ball, she pointed to her vagina (Q9).

54. The contention of the Defence is that this statement was never made by the complainant herself, but it represents a distorted version of what her mother had told the police or a construction of the police. The Defence further argues that even if this statement was accepted as having been made by the complainant, it does not contain a connotation that the accused penetrated the complainant's vagina with his finger.

55. When the alleged statement was being recorded by Corporal Amani, the complainant's mother Ikinesi was present. Ikinesi testified to what transpired at that point in time. According to her, the complainant was given some snacks to make her speak. The complainant then spoke and mentioned '*Masi ball me*'. When she asked what 'ball' means, the complainant pointed to her vaginal area.

56. Ikinesi first denied answering the questions on her daughter's behalf. However, she later admitted that when the complainant did not answer the questions, she intervened. When asked- *where Masi is?* she admitted giving the answer on the complainant's behalf. She also agreed that the answers *na polo'?* (the ball), '*o koya na polo.*' (Masi ball polo) were given by her and the questions *'I vei o Masi?'* (where is Masi?), *'a cava ara o Masi?'* (what did Masi touch?) were asked by her. She agreed to sign on behalf of her daughter. Under re-examination, Ikinesi said that she had to give answers on behalf of the

complainant because the complainant was not speaking enough, not fluent in speaking and because she remained silent. Ikinesi however said that she gave those answers based on what she heard from the complainant when she arrived home that night.

57. Corporal Amani denied that the answers were given by Ikinesi although he agreed that the mother signed the statement on her daughter's behalf. He denied that the answers recorded in the complainant's statement consisted of his interpretations and not what was stated by the complainant.

58. Corporal Amani further said that, when the complainant uttered the words '*Masi ball*', she was pointing to her vagina and her body language showed that something was done to her private part. This part of Corporal Amani's evidence is consistent with what Ikinesi said in Court. Ikinesi said that the complainant mentioned that '*Masi ball me*'. When she asked what 'ball' meant, the complainant pointed to her vaginal area. However, there are some inconsistencies *(inter-se)* in their evidence on this issue. Considering the evidence of Corporal Amani and Ikinesi, I find that Ikinesi has contributed to the contents of the statement which the Prosecution says was entirely made by the complainant. I am unable to accept that the entirety of PE 1 is a statement of the complainant.

59. However, this finding does not mean that PE1 is devoid of any evidential value. Its probative value should be weighed in the light of other evidence led in the trial, particularly in the context that it involves the rights of an extremely vulnerable toddler and having due regard to the rights of the accused to a fair trial. Ascertainment of truth should ultimately be the goal of the fact-finding task of this Court. Considering the other evidence led in the trial, I accept that the complainant when asked *what did Masi touch?* she replied '*Masi ball me*' and that when she was asked what 'ball' meant, she pointed to her vaginal area.

60. Let me analyse Vasenai's evidence. When Vasenai was sitting outside at around 9 p.m., she saw the accused sitting on the porch (this was admitted by the accused). Suddenly,

the light on the porch was turned off, so she came home and opened the door at the entrance. The accused's room was right opposite the entrance. As she entered the house, the complainant ran to her from the room where the accused was. The complainant was only wearing a T-shirt with nothing at the bottom. When Vasenai entered the room, she saw the accused lying down in the room, wearing only a towel. She then asked the accused, what had happened? (this was admitted by the accused). The accused did not say anything. She said she asked that question as she was suspicious that the complainant was not wearing her trousers which she was wearing at night.

61. Then the complainant said '*Masi, Polo, Vesi, au*'; (Masi ball me). Vasenai was sure the complainant was referring to her vaginal area. The complainant used the word *vesi* because Fijians used this word to describe their private area. When Ikinesi arrived home at around 11 p.m., Vasenai informed Ikinesi of what had happened.

62. Ikinesi said she spoke to the complainant upon her arrival at home at around 11 p.m. She said that the complainant was in a state of shock and, after taking some time, she (the complainant) informed her that 'Masi ball me'.

63. Vasenai's evidence as to what she heard from Ikinesi is consistent with that of her sister, except for one thing. Vasenai did not say in Court that she saw the accused playing with the complainant on the porch before the alleged incident. That inconsistency is not that material to the issue at hand and it does not affect the credibility of the witnesses. Further the accused in his caution interview had admitted that he was playing with the complainant at the porch.

64. The accused is the nephew of both Ikinesi and Vasenai. He was raised in the same house as a member of their family. They had maintained a good mutual relationship until the alleged incident occurred. Vasenai maintains that relationship to date. These two witnesses have no reason to make up such a serious allegation to put the accused in

trouble. The demeanour of the witnesses was consistent with their honesty. I accept that both Vasenai and Ikinesi told the truth in Court.

65. The complaint made by the complainant to her mother and her aunt soon after the alleged incident is consistent with the allegation of rape as charged.

66. The conduct of the accused and the conduct of the complainant soon after the alleged incident were also consistent with the guilt of the accused. The accused was shocked when Vasenai entered the room. When Vasenai asked what had happened, the accused did not say anything. Without denying the allegation, he had left home that night and was not present when Ikinesi returned home at 11 p.m. When the accused was confronted by Ikinesi the following morning and told him that he had touched her daughter and that what he did was not right, there is no evidence that the accused denied the allegation. The conduct of the accused is consistent with his guilt.

67. The attendant circumstances before and soon after the alleged incident support the version of the Prosecution. The light on the porch was suddenly switched off. The complainant was not wearing her trousers which she had worn, and she had come from the room where the accused was lying down wearing a towel.

68. Let me now analyse the medical evidence. Doctor Adi Tabua is an independent expert witness. Her expertise was not challenged. She had medically examined the complainant on 8 March 2020, a few hours after the alleged incident. Upon examination of the complainant's genital area, the doctor noted abrasions on the left *labia minora*, and that the complainant's hymen was not intact. The doctor also noted some discharge with a foul-smelling at the vaginal orifice. According to the doctor, those findings and injuries are consistent with forceful trauma or penetration into the vaginal orifice. All the injuries were of recent origin. The doctor opined that those injuries could have been caused by any foreign object like a finger, or a stick, that could penetrate the hymen. Inadvertently, the doctor has not penned down her opinion in her medical report. That omission is not

material enough for me to reject the doctor's medical findings and opinions expressed in Court.

69. There is no evidence that the complainant had fallen or landed awkwardly on the ground or that she was horse riding or riding a bicycle, which, according to the doctor, could be possible activities that could break the hymen. Further, the foul-smelling emanated from the vaginal discharge was indicative of an infection which for a 2-year-old would not be normal. The doctor's medical evidence is consistent with the allegation of digital penetration.

70. Finally, I come to the alleged confession made by the accused to Corporal Amani. It is the case for Prosecution that the accused confessed to the alleged digital rape in his caution interview in the answers given to questions 82 to 87.

71. Generally, a *voir dire* inquiry is run to test the admissibility of confessionary statements, because the law does not allow an accused to be convicted on his or her own confessions made to the police. However, there is an exception to this rule when the court is satisfied beyond reasonable doubt that the confession has been made voluntarily. When a confession has been made to a lay person, however, this rule does not apply. It is entirely a trial issue as opposed to one of admissibility, that turns on the assessment of the trier of facts as to the truthfulness of the confession.

72. The admissibility of the record of the caution interview was not challenged by the Defence in this case. The position of the Defence is that the police fabricated the confessionary parts of the caution interview to implicate the accused in the crime. Whether the accused told the truth to police should be gathered from the contents of the statement itself and the attendant circumstances. Does the evidence support the Prosecution's allegation that the police fabricated the confession?

73. According to Corporal Amani, the interview was conducted in English language because it was the language preferred by the accused. The accused had received education up to Form 7. Amani said that the accused answered all the questions voluntarily. The accused was seated with Amani facing the screen of the computer and the accused was told to go through what was being typed as he typed. After being printed out, the printout was given to the accused so that he could read. The confessionary parts had been highlighted in bold letters. The accused had signed to acknowledge that he read and understood the contents. At Q 106, the accused was given the record of the interview which he had read taking seven minutes during the suspension. At Q 109, the accused has signed to acknowledge it to be the correct record of the interview and the presence of his signature on each page suggests that it was read before signing.

74. The accused had not exercised his right to counsel at the beginning. However, Corporal Amani thought it fit to make legal counsel available to the accused from the Legal Aid Commission in view that the accused had made a confession. The accused has had an opportunity to consult the counsel freely, but he has not changed any of his answers or made any complaints after the consultation.

75. There is no dispute that the accused is related to Corporal Amani. The accused is his cousin. The accused agreed to Amani to be the interviewing officer without any objection. The evidence of Amani that he maintained a good relationship with the accused and that the accused was comfortable with him at the interview was not disputed.

76. It was admitted that no witnessing officer was present at the interview. It is not disputed that the interviewing officer himself is the person who recorded the witness statements. It was argued by the Defence that the conducting of the interview by a relative; in the absence of a witnessing officer, and by the same person who had recorded the witness statements had been prejudicial to the accused.

77. As a matter of good practice, it is appropriate to ensure the presence of a witnessing officer at the interview to guarantee the fairness of the process, but the presence of a witnessing officer is not a must. Not to mention the importance of ensuring the independence of the interview process from the investigation. The question is whether the accused was prejudiced by having the interview conducted by his cousin in noncompliance with the said protocols which I alluded to above. I do not believe it did. Rather, this setting would have encouraged the accused to tell the truth freely as the recipient of his story, from his perception, was not a person in authority, but his cousin.

78. As I said before, the admissions/confessions made to a person not in authority are admitted without being tested for voluntariness. The only trial issue in such a scenario is whether the accused told the truth to the witness. I find no evidence that Corporal Amani had an ulterior motive to fabricate the record of the interview to put the accused, who is his cousin, in trouble.

79. Finally, it was argued that the interviewer could not have practically recorded (typed) such numbers of questions and answers as had been recorded within the time frame mentioned in the record of the caution interview. It was agreed that on average 1-2 minutes have been spent on each question and answer. The record consists of a mixture of long and short questions and answers, and I do not think that the time frame mentioned in the record is unrealistic.

80. Let me now turn to certain issues that were raised by Defence in relation to the contents of the record of the interview which it argues to be suggestive of fabrication. Mr. Filipe in his cross-examination drew the court's attention to questions and answers 73, 74 and 79-81.

81. Corporal Amani agreed that the complainant had never used the words vagina or penis in her statement. However, he used those words in Q 73 of the interview. He said he asked questions 73 and 74 based on the answers to questions 8 and 9 of the complainant's

witness statement and, Q 74, as a follow-up to question 73. Let me reproduce Q73 and Q74 and the answers recorded for easy reference.

> Q 73. Just imagine, as a two-year-old child, did she know (sic) anything about the name of our private part namely penis or vagina?
> A. No.
> Q 74 Then how did you expect AL to say "Masi Polo Au" meaning Masi penis me?
> A Wished to remain silent.

82. Question 73 is purely a hypothetical question requiring an answer based on the accused's general knowledge. It has been answered in the negative. The follow-up question (Q 74) has not been answered. These questions and answers do not give rise to an inference that they have been fabricated. In any event, they do not form part of the confession and no prejudice to the accused has been caused even if they have been fabricated.

83. From question 79-81, the interviewer has based his questions on the medical report. I would reproduce those questions and answers for easy reference:

> Q 79: Have a look at this medical report, whose medical report is this? (Medical report shown to him)
> A: AL
> Q: 80: Have a look at this illustration. What does this illustration is about (sic)? (Illustration shown to Apenisa Cuqu)
> A: Woman's private part
> Q: 81 Can you read what all these labels say about the illustration?
> A: Yes it stated that AL's vagina has been injured.

84. Corporal Amani said that he recorded the exact answer given by the accused to question 81. He has not put a leading question about the injuries. When the interviewer questioned about the labels on the illustration, the answer of the accused had been -*Yes it stated that AL's vagina has been injured.* In the illustration, it is clearly mentioned that abrasions are noted on the *labia minora.* The accused has received education up to Form Seven in a High School. Given his level of education, it can be assumed that the accused could

understand the word 'abrasion'. The accused did not give evidence to say that he did not give those answers. Therefore, I am unable to accept that the questions and answers in that part of the caution statement shave been fabricated by the police.

85. In answer to question 71, the accused has in fact denied the allegation and said - *I told her (Vasenai) that I didn't do anything to AL.* It is noteworthy that the accused started to make admissions soon after the medical report was shown to him. Therefore, the caution statement should be considered as a mixed statement where both admissions and denials are present. If the interviewer fabricated the caution statement, he wouldn't have included the denials in the record of the interview. It is reasonable to assume that the accused started to make admissions when he realised that it was futile for him to deny the allegation when the medical report states that the complainant's vagina has been injured.

86. I turn to the concerns raised on the ability of an accused to provide a mixed statement, containing admissions and self-serving explanations and denials, without giving evidence. The perceived difficulty is that the whole statement has to be introduced as evidence and the accused elects not to testify without being subjected to cross-examination. In the leading case of Duncan (1981) 73 Cr App R 359, Lord Lane CJ observed (at 365):

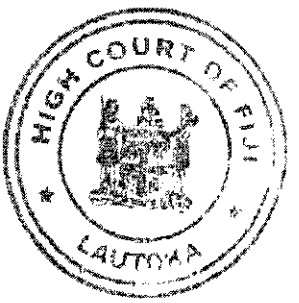
> . . . where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence.

87. This guidance has twice been approved by the House: Sharp [1988] 1 WLR 7; Aziz [1996] AC 41.

> .... Specifically, it should not be possible for an accused, in a case where his conduct calls for an explanation, to advance a submission at the end of the prosecution case that the prosecution have not eliminated a possible innocent explanation. Such submissions should generally in practice receive short shrift.

88. Having considered these legal pronouncements. I considered the caution statement of the accused as a whole to find out where the truth lies. In answer to question 71, the accused has basically denied the allegation. In the question and answer recorded from Q.82 to 87 the accused had admitted the allegation that he penetrated the vagina of the complainant with his finger and made a confession to the charge of rape as charged. I accept that the accused told the truth in his answers to Q.82 – 87. His confession is consistent with other circumstantial evidence led in this trial. The only plausible inference that can be drawn from the evidence led in this trial is that the accused is guilty of the offence as charged.

89. I am satisfied that the Prosecution proved the charge beyond reasonable doubt. I find the accused guilty of Rape as charged. The accused is convicted accordingly.



Aruna Aluthge

Judge

5 October 2023

Solicitors:

Office of the Director of Public Prosecutions for State

Legal Aid Commission for Defence