

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 177 OF 2021

BETWEEN

STATE

SAIMONI DRUGU

Counsel

Ms U Tamanikaiyaroi for the State

Ms R Nabainivalu for the Accused

Date of Hearing

9-10 August 2023

Date of Judgment

29 September 2023

JUDGMENT

[1] **Introduction**

The trial commenced after the accused pleaded not guilty to nine counts of rape (counts 2, 3, 6, 8, 9, 11, 13, 14, 16), six counts of sexual assault (counts 1, 5, 7, 10, 12, 15) and one count of criminal intimidation (count 4).

[2] After close of the case for the prosecution, the accused was acquitted on counts 2, 7, 8, 9, 13, 14, 15 and 16 and put to his defence on counts 1, 3, 4, 5, 6, 10, 11 and 12.

[3] The accused chose to give evidence but he does not carry any burden to prove or disprove anything. The burden is on the prosecution to prove each charge beyond a reasonable doubt. This burden never shifts on the accused.

- [4] Count 1 alleges that the accused on an unknown date between 1 January 2016 and 31 December 2016 at Lami unlawfully and indecently assaulted JMD by kissing her lips and sucking her tongue.
- [5] Count 3 alleges that the accused on the same occasion as Count 1 had carnal knowledge of JMD a child under the age of 13 years by inserting his penis into her anus.
- [6] Count 4 alleges that the accused on the same occasion as Count 1 without lawful excuse threatened to kill JMD with intent to cause alarm to her.
- [7] Count 5 alleges that the accused on an unknown date between 1 January 2017 and 31 December 2017 at Lami unlawfully and indecently assaulted JMD by kissing her lips and sucking her tongue.
- [8] Count 6 alleges that the accused on the same occasion as Count 5 penetrated the mouth of JMD a child under the age of 13 years with his penis.
- [9] Count 10 alleges that the accused on 6 August 2018 at Nadi unlawfully and indecently assaulted JMD by kissing her lips and touching her buttocks.
- [10] Count 11 alleges that the accused on the same occasion as Count 10 penetrated the vagina of JMD a child under the age of 13 years with his finger.
- [11] Count 12 alleges that the accused on an unknown date between 1 January 2019 and 31 December 2019 at Nadi unlawfully and indecently assaulted JMD by kissing her lips and her tongue.

[12] **Elements of Charged Offences**

The offence of rape has three elements: the penetration of the complainant's vagina, anus or mouth by the accused with penis, finger or an object, the complainant not consenting to sexual penetration and the knowledge of the accused that the complainant was not consenting. Slight penetration is sufficient. In this case, the complainant was incapable of giving consent because she was under the age of 13 years at the relevant times.

[13] Sexual assault is an offence contrary to section 210 (1) (a) and (2) of the Crimes Act. An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused the complainant fear or pain. Unlawful means without lawful excuse. The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone.

[14] The elements of criminal intimidation are: the accused without lawful excuse threatened the complainant with an injury and that the intention of the accused was to cause the complainant alarm. The intention of the accused is a matter for inference from all the proven facts.

[15] **Evidence, Analysis and Findings**

Special measures were used to receive the evidence of the complainant because she is still a child. The purpose of the special measures was to put the witness at ease when giving evidence and not to prejudice the accused.

[16] I approach the evidence dispassionately and without sympathy. I decide the credibility and weight of the evidence. I do so I bear in mind the rules regarding assessment of credibility and reliability of evidence.

- [17] Both parties have agreed to certain facts. The admitted facts are considered true. The accused was born on 19 March 1978. He was 38 years old by May 2016.
- [18] In 2002, the accused married LL (the complainant's mother). Together they have six children. The complainant is the youngest.
- [19] The complainant was born on 30 May 2006. She was 10 years old by May 2016.
- [20] In 2010, the accused was employed as a soldier at the Royal Fiji Military Forces (RFMF) and had left Fiji for Peace Keeping duties in Sinai. During this time, the complainant, her mother and her siblings resided at Valenicina settlement, Lami. In 2011, the accused was terminated from the Royal Fiji Military Forces.
- [21] In 2012, the accused was employed at the Professional Security Services. In 2013, the accused joined the Fiji Corrections Service. However, he was later terminated from the Fiji Corrections Service in 2014.
- [22] In 2015, the accused was recruited by Varinava Tiko to join Access United Security Company in Iraq. Given the nature of the work, the accused began to travel to and from Iraq and would spend a few months there then return to Fiji for a few weeks at a time.
- [23] In 2016, the complainant's mother and the oldest sibling travelled to Sigatoka to sell perfumes that the accused had brought from Iraq. The complainant and her other siblings remained at their home in Suva.
- [24] In 2017, the complainant was in Class 6 and attended Lami Primary School.

- [25] Sometime in 2018, the complainant and her siblings accompanied her mother to reside with their aunt at Vuci, Nausori. At the said time, the complainant was in Class 7 and attended Vuci Methodist Primary School.
- [26] Sometime in August 2018, the complainant accompanied her mother and siblings to Nadi to meet the accused arrived from Iraq. They stayed at the Blue Light Hotel in Nadi.
- [27] Sometime in 2019, the complainant accompanied her mother and siblings to Nadi to meet the accused arrived from Iraq. They stayed at the Blue Light Hotel in Nadi.
- [28] In relating to 2016 incident, the complainant said that her mother had gone to Sigatoka and that she was at home with her father and two of her siblings. She was in class 5. Her father was drinking on that day. After he drank he went inside a room and called the complainant and her siblings inside the room to sleep. He made the complainant close the door. There were two beds inside the room. He forced the complainant's two siblings to sleep on one bed while he was lying on the other bed.
- [29] After the siblings had fallen asleep the accused told the complainant to come to his bed. He told her to undress. She felt scared and embarrassed. He was her dad. She did not want to undress. He then pulled down her pants and underwear and told her to lie down on his bed facing the mattress. He told her that he was going to rub his penis on her buttocks. She felt something hard like a penis being rubbed upwards and downwards on her buttocks. He was not wearing his pants when he was doing that. She was scared and crying. She felt fluids and her buttocks were wet. He then stood up and kissed her on her mouth and he also told her for them to kiss each other.

- [30] After kissing the complainant, the accused prayed saying "Father we have just finished our lesson". The accused then got the complainant to clean herself in the bathroom and then return to the room to sleep. He accompanied her to the bathroom and while they were there he threatened her not to tell anyone especially her mother or he will kill her. The complainant did not report the incident to her mother because she was scared of the threat that the accused made to her.
- [31] In relating to 2017 incident, the complainant said that she accompanied her father to buy cooking gas in their vehicle while they were living in Lami. Her brother wanted to come with them in the vehicle but her father did not allow him. She was in class 6. She sat at the back seat. When they reached Wailada her father parked the vehicle and told the complainant to come to the front seat. She was reluctant but he forced her to come across to the front seat. When she came to the front seat he told her to kiss him. When she refused he told her to put her tongue out. He then forced her to put her tongue out. He sucked her tongue. He asked her whether she knew what that was and when she said no, he told her that was kissing.
- [32] From Wailada they drove passed Kalekana Street to a remote location. After leaving Wailada the complainant moved back to the back seat. Her father parked the vehicle and came to the back seat. While on the back seat he forced her to take her tongue out and he sucked her tongue. While he was kissing her he began to unzip his penis. He took his penis out and was stroking it by moving his hand up and down on his pants. He told her to suck his penis like a lollipop. When she refused he threatened to throw her down the cliff. She was crying and felt disgusted. She sucked his penis. He told her not to be scared and that all fathers were doing that to their daughters so that when they grow up they should know what to do. While she was sucking his penis she felt or tasted something different. She opened the car door to spit out. He told her to drink it. She saw a white fluid coming out of his penis. She didn't know what it was. He told her it was called sperm. He then stood up and returned to the driver's seat. They went and bought

gas and returned home. The complainant did not report the incident to her mother because she was scared of her father's threat.

[33] In relating to 2018 incident, the complainant said in August 2018 she had travelled to Nadi with her mother and siblings to pick up her father who had arrived from Iraq. She was in class 7. They all stayed at Blue Light Hotel in Nadi. The complainant said on this day her father bought drinks and he made her mother and older brother to drink with him. He made them drunk and then told the complainant to accompany him to buy lunch. He drove to a remote location somewhere back of Nadi and parked the vehicle. He got out and came to the back seat. He kissed her on the mouth and then touched her 'mimi', referring to her private parts. She could see and also feel his two fingers when he was touching her private parts. He was touching inside her 'mimi' and he was moving it up and down, like playing with it. He did that for a long time. After that they returned to the hotel. She did not complain to her mother or siblings. She was scared that her father would kill her if she complained.

[34] In relating to 2019 incident, the complainant said that she was staying in a hotel in Nadi with her mum, dad and siblings. Her father woke her up and told her to go inside the toilet. When she woke up her mother and brother were not there. She accompanied her father to the toilet. When she entered the toilet her father locked the door. She was crying. She was scared of her father. He told her to remove her pants and underwear. While taking off her pants and her panty he kissed her mouth. After that he went down and he put his tongue on her vagina. He was moving his tongue up and down her vagina. When he was doing that there was a knock at the door. He told her to quickly wear her pants and panty and lie down and just pretend to sleep. She did not complain to her mother because she was scared of her father.

[35] The accused gave evidence in his defence. His evidence is that the complainant was his only daughter. She was his favourite and he always loved her. He was very strict on her and restricted her from going out. Sometimes he smacked her for coming home late. Once she came home with a bite on her breast when she was 13 years old. He slapped her because he didn't like what he saw and that she was young. He did not commit any sexual acts on her at any time. He never uttered threats to kill her.

[36] When he returned home from Iraq he came to know that his wife was having an affair with his brother. He stayed at Blue Light Hotel only once. In 2020 he came back to Fiji for good because of Covid. He started having marital problems. He didn't stay with his wife. He went and stayed with Viniana, a lady he had two children with. At the time he was also having a relationship with one Josephine. When Josephine found out that he was staying with Viniana, she came and fought with her. He said that Josephine and the complainant's mother got together and made up the allegation that he sexually abused the complainant. Josephine reported the allegation to police.

[37] The accused in his evidence denies committing any of the alleged sexual acts. However, I do not believe him. His evidence that the allegation of sexual abuse is a fabrication by the complainant's mother and his girlfriend, Josephine is far-fetched.

[38] However, not believing the accused does not mean that he is guilty of committing the alleged offences. The burden is on the prosecution to establish his guilt.

[39] According to the complainant the accused first abused her sexually in 2016 when she was about 10 years old. At the time she was of a very tender age. She gave an account of incidents that occurred over a period of three years. When she gave

evidence at the trial she was 17 years old. She relied on her memory for the details. She couldn't remember the exact dates of the incidents.

[40] However, she struck me as an honest witness. I believe her. I believe her when she said that in 2016 at Lami the accused kissed her mouth, stroked his penis on her naked buttocks until he ejaculated and then threatened to kill her if she reported to anyone. She said that she was scared of his threat and did not report to anyone.

[41] I believe her account that the accused in 2017 at Lami forcefully sucked her tongue and penetrated her mouth with his penis until he ejaculated. She did not report to anyone because she was scared of his threat.

[42] I believe her account that the accused in 2018 at Nadi kissed her on the mouth and stroked her mimi (vagina) with his fingers.

[43] I believe her account that the accused in 2019 at Nadi kissed her on the mouth before licking her vagina. The act of the accused licking the complainant's vagina is an uncharged act. The only use I make of that evidence is to put the act of the accused kissing the complainant on the mouth into proper context. The uncharged act shows that there was a sexual connotation in the act of kissing the complainant on the mouth by her biological father.

[44] The complainant was consistent with her account that she did not report to anyone about these incidents. She gave reasonable explanation for not immediately complaining to anyone. She was a child and the accused was her biological father and an authority figure over her. She was scared of him. I do not accept that she fabricated the allegations against her biological father because he was strict on her or that she colluded with her mother and her father's girlfriend to fabricate the allegations out of spite.

[45] On count one, I feel sure that the accused without lawful excuse sexually kissed the complainant on her mouth. I feel sure that the act of kissing on the mouth of the complainant was indecent, that is, contrary to the ordinary standards of respectable people in this community. I find the accused guilty of sexual assault as charged on count one.

[46] On count three, I feel sure that the accused rubbed his penis on the complainant's buttocks but I am not sure that the accused penetrated her anus with his penis. The prosecution has failed to prove rape as charged beyond a reasonable doubt. But that does not mean that the accused is absolved from all criminal responsibility.

[47] Section 162 (1) of the Criminal Procedure Act states:

Where a person is charged with an offence but the court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser offence or alternative offence, the court may record a conviction made after due process for (f) any sexual offence where the charge has been for rape.

[48] Section 162 (2) of the Criminal Procedure Act states:

The court may record convictions for certain offences in accordance with sub-section (1) notwithstanding that no charge has been laid for the lesser or alternative offence in accordance with the provisions of this Act.

[49] Before the commencement of the defence case, I gave the accused notice of the court's power to convict him of sexual assault in the event the element of penetration required for rape is not proven beyond a reasonable doubt.

- [50] On count three, I find the accused not guilty of rape but guilty of sexual assault contrary to section 210 (1) (a) and (2) of the Crimes Act.
- [51] On count four, I feel sure that the accused without any lawful excuse threatened to kill the complainant, with intent to cause alarm to her. I find the accused guilty of criminal intimidation as charged.
- [52] On count five, I feel sure that the accused without lawful excuse sexually sucked the complainant's tongue. I feel sure that the said act of sucking the complainant's tongue was indecent, that is, contrary to the ordinary standards of respectable people in this community. I find the accused guilty of sexual assault as charged on count five.
- [53] On count six, I feel sure that the accused penetrated the mouth of the complainant with his penis. The complainant was under the age of 13 years at the time and incapable of consenting. I find the accused guilty of rape as charged on count six.
- [54] On count ten, I feel sure that the accused without lawful excuse brought his mouth in contact with the complainant's mouth and sucked her tongue. I feel sure that this act of kissing the complainant was indecent, that is, contrary to the ordinary standards of respectable people in this community. I find the accused guilty of sexual assault as charged on count ten.
- [55] On count eleven, I feel sure that the accused penetrated the vagina of the complainant with his finger. The complainant was under the age of 13 years at the time and incapable of consenting. I find the accused guilty of rape as charged on count eleven.
- [56] On count twelve, I feel sure that the accused without lawful excuse brought his mouth in contact with the complainant's mouth and sexually kissed her. I feel sure

that this act of kissing the complainant was indecent, that is, contrary to the ordinary standards of respectable people in this community. I find the accused guilty of sexual assault as charged on count twelve.

[57] The prosecution has proved the accused's guilt beyond a reasonable doubt.

[58] **Verdicts**

The Court's verdicts are:

Count 1 – Convicted of sexual assault as charged.

Count 3 – Not Guilty of Rape but convicted of lesser offence of sexual assault.

Count 4 – Convicted of criminal intimidation as charged.

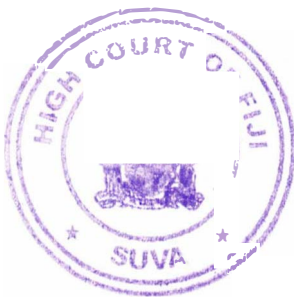
Count 5 – Convicted of sexual assault as charged.

Count 6 – Convicted of rape as charged.

Count 10 – Convicted of sexual assault as charged.

Count 11- Convicted of rape as charged.

Count 12 – Convicted of sexual assault as charged.



Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused