

**IN THE HIGH COURT OF FIJI AT
LAUTOKA
CRIMINAL JURISDCITION**

Criminal Case No: 035 of 2022

STATE

-v-

JONE LUTUI QALOVI

Counsel: Ms Prakash of DPP for the State
Ms Sharma & Ms Shafique of LAC for the Defence

Date of Hearing: 18th March, 2024 to 26th March, 2024

Date of Judgment: 5th April 2024

JUDGMENT

The name of the complainant is suppressed. Accordingly the name of the complainant will be referred to as "UR"

1. The accused is charged with two counts of Rape contrary to section 207 (1) and (2) (b) of the Crimes Act 2009 and two counts of Sexual Assault contrary to section 210 (1) (a) of the Crimes Act 2009.
2. The offences and its particulars are as follows;

First Count

Statement of Offence

Sexual Assault: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Jone Lutui, between the 22nd day of November 2021 and the 23rd day of November, 2021 at Nadi in the Western Division unlawfully and indecently assaulted **UR** by kissing her on the lips, neck, right shoulder up to the forearm and stomach.

Second Count

Statement of Offence

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

Particulars of Offence

Jone Lutui, between the 22nd day of November 2021 and the 23rd day of November, 2021 at Nadi in the Western Division, penetrated the vagina of **UR** with his tongue.

Third Count

Statement of Offence

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

Particulars of Offence

Jone Lutui, between the, 22nd day of November 2021 and the 23rd day of November, 2021 at Nadi in the Western Division, penetrated the vagina of **UR** with his finger.

Fourth Count

Statement of Offence

Sexual Assault: Contrary to Section 210(1) (b) (1) of the Crimes Act 2009.

Particulars of Offence

Jone Lutui, between the 22nd day of November 2021 and the 23rd day of November, 2021 at Nadi in the Western Division procured **UR** without her consent to touch the penis of **Jone Lutui**.

3. The accused pleaded not guilty to all four (04) counts. The matter had proceeded to trial from 18th March 2024 and concluded on the 26th March 2024. The Prosecution presented the evidence of three witnesses, including the Complainant. The Accused remained silent during the Defence case. Afterwards, the Court heard the oral closing submissions of the Counsel for the Prosecution and the Defence. In addition to their oral submissions, the learned Counsel for the Prosecution and the Defence filed their written submissions. Having carefully considered the evidence adduced before the Court and the respective oral and written submissions of the parties, I now pronounce the Judgment of this case.

Burden and Standard of Proof

4. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

Elements of the Offences

Rape

5. The main elements of the offence of Rape as charged on the second (2nd) count
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his tongue
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his tongue
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his tongue in that manner.
6. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed this offence against the Complainant. There was undisputed evidence that the accused had met the complainant at Bullachino Café shop on the 22.11.21 where the complainant told the accused that he was a 14 year old student of Nadi Sangam College.

7. Evidence of the slightest penetration of the vagina of the Complainant with the tongue of the Accused is sufficient to prove the element of penetration.
8. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
9. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his tongue and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.
10. Furthermore, the law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard, I direct myself that if this court finds the accused not guilty of the first count of rape then it should consider the lesser offence of sexual assault.
11. The main elements of the offence of Rape as charged on the 3rd Count are that:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his finger
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his finger
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his finger in that manner.
12. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed this offence against the Complainant. There was undisputed evidence that the accused had met the complainant at Bullachino Café shop on the 22.11.21 where the complainant told the accused that he was a 14 year old student of Nadi Sangam College.

13. Evidence of the slightest penetration of the vagina of the Complainant with the finger of the Accused is sufficient to prove the element of penetration.
14. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
15. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his finger and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.

16. **Sexual Assault**

Section 210 (1) (a) and (2) of the Crimes Act defines sexual assault as follows:

(An person commits an indictable offence (which is triable summarily) if he or she—

(a) Unlawfully and indecently assaults another person; or

(2) The offender is liable to a maximum penalty of 14 years imprisonment for an offence defined in sub-section (1)(a) or (1)(b) (i) if the indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.

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.

17. 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. If an accused touches the complainant’s body or uses

in a way which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.

Admitted Facts

18. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these facts as accurate truthful and proven beyond reasonable doubt.
19. The admitted facts are reproduced herewith as,
 - i) The complainant in this matter is “UR” 14 years old, student of Savunawai Stage 2, Votualevu, and Nadi.
 - ii) The accused in this matter is Jone Lutui, 49 years old of Carrera’s Road, Votualevu Nadi.
 - iii) At the time of alleged offence the accused was employed at Bulaccino café, Namaka, Nadi
 - iv) The accused was normally engaged on a 4.00pm to 7.00am shift.
 - v) On 22nd of November 2021 the accused had met the complainant at Bulaccino café.
 - vi) The Complainant told the accused that she was a year 9 student at Nadi Sangam .

Prosecution Case

- 20 The complainant “UR” informed the court that she is currently residing with her parents at Navo in Nadi. The name of her parents are Tirisa Qorotabua and Waqanui.
- 21 She said they have moved to Navo Nadi since December 2023. The complainant is 16 years of age and is a student at Korovuto .
- 22 In 2021 the complainant was residing in Votualevu and was schooling at Nadi Sangam. She was in Form 3 in 2021 and was residing with her parents at Votualevu together with her siblings.
- 23 She was 14 years at that time and her date of birth 27.06. 2007.
- 24 In 22nd of November 2021 she was at Home that morning. She had her breakfast and then went to town at around 10.00am to pick her school worksheet. She arrived back home between 3 o’clock to 4’oclock in the afternoon.

- 25 When she arrived home the complainant's mother was very angry with her and beat her up. Thus, she left home after that and whilst walking on the road at Namaka she was picked up by a car who had dropped her at Namaka. She got of the car at RC Manubhai at Namaka.
- 26 She said while she was walking along Namaka she met a man who works as a security at Bulaccino and she ask him if she could use his mobile phone to make a call.
- 27 The security at Bulacchino gave her his mobile phone and she called a taxi driver namely Chris top pick her up. She said the taxi driver said he was busy and could not come.
- 28 She went and was standing at the bus stop and some boys came there. While she was standing there an Indian boy came and told UR that the security at Bulachino was calling her.
29. Hence, she went to the security at Bulachino and the he informed her that the taxi driver was returning the call on his mobile phone. Later the taxi driver called and told her that he cannot come.
30. She than sat down at Bulachino. The security was asking her some questions. He was asking her where she was residing, whether she was having a relationship or not. He responded to those questions.
31. In cross examination when it was put to the complainant that it was getting dark and it was about curfew time that she should go home? She answered saying "No". The security told her that he is going to buy Blitz for them to eat. The security then told UR for them to go up.
32. They talked for a while and the security told her that he was going to buy potato chips. She said they ate potato chips and the security told her for them to go down to a room. It was an empty room
33. In cross examination she denied that she told the accused that she was afraid of the dark and asked him to sleep beside her. She also denied that that she did not stopped the accused from kissing her neck shoulder and chest. She was also moving backwards when the accused was kissing her because she did not like what the accused was doing to her.
34. She said the Bulachino was not in operation at that time. The security then spread the cartons and told her to lie down on it. She said she laid down and the security also laid beside her. She said the security than started kissing her forearm shoulder, neck and chest area of her body. She said the security started to remove her pants and started to lick her "thing". She said that when she said her "thing" she is referring to her vagina.

35. She said when the security was licking her vagina she was moving backwards and pushing the security's head away. She said she was doing that because she did not like what the accused was doing to her. She said when the accused was kissing her she moved to the side because she was scared.
36. She said the accused licked her vagina for about 5 minutes.
37. In cross examination it was put to her that she allowed the accused to lick her vagina. But she denied saying "NO".
38. She said the accused also did it with his hand.
39. She said the accused inserted his hand into her vagina. She said it took place after leaking her.
40. She said the security laid beside her after inserting his hand into her vagina. She also said that she moved backwards when the security was inserting his hand into her vagina and she was in pain.
41. In cross examination it was put to her that the accused was touching her vagina and she never stopped him as she was enjoying it. She agreed that the accused was touching her vagina but she disagree that she did not stop him or was enjoying it.
42. She said she could not ran away from Bulachino because it was curfew hours.
43. She said she did not scream because she was afraid that the security might do something to her or kill her.
44. She said she slept and woke up in the morning. The security gave her a toothbrush for her to brush her teeth. The security also gave her \$20.00 and she went to buy a conditioner and spray. The security told her to buy bread with it.
45. She then went to her friend. Her friends name is Sainimere in the market in the afternoon. She said her father found her at her friend's house and took her home.
46. At home her mother started to ask her where she was and she told her mother that she was at her friend's house. She said her mother asked her did something happened to her she replied saying "yes".
47. She told her mother what the security at Bulaccino had done to her.
48. She also remember that she went for medical examination.
49. She was asked about the security at Bulaccino if she sees the person again would she able to identify. She answered saying yes and pointed at the accused sitting in the accused box.

50. The second witness **Tirisa Qorotabua** is the mother of the complainant. She stated that her family previously was living at Votualevu for 3 years prior to moving to Navo, Nadi late last year. She lives together with her husband and four children.
51. She said on the 22nd November, 2021 she was residing at Votualevu, with her husband and her four children namely, Raymond Ravatu, Lily Ravatu, Unaisi Ravatu and Sairusi Ravatu.

52. According to her on that day two of her children were with her whilst one of the two (complainant) was supposed to go to school and bring her books.
- 53 She said the complainant returned around 3.00 to 4.00 pm and she got angry with complainant and smacked her with a belt
- 54 She was cooking when the complainants elder sister informed her that the complainant went out of the house.
- 55 They looked for her but could not locate her as it was within curfew time and they had to return home and wait for husband. They did called the police the next day and her husband went to get her from the residence of her school friend's namely Sainimere.
- 56 She said when she asked the complainant where was she, the complainant was silent for a long time, then the complainant told her that she was at Bulachinno and one security did something bad to her there than the complainant started crying.
57. At the police Station, the police started questioning her and she was sitting beside the complainant. The complainant told police everything and after questioning she was taken to Medical Services Pacific at Lautoka to have her medical examination done. It was the police the complainant and herself who all went to MSP
- 58 The third witness was the **Doctor Salome Daunivalu**. She was on duty on the 30.11.21 at Medical Services Pacific when the complainant was brought in by the police and her mother for medical examination in an alleged case of Rape.
59. She had tendered in the complainants Police Medical Examination report of "UR" the complainant as part of her evidence in this case. She said that consent was obtained from the complainant and her mother for the examination to be conducted and they have signed to confirm the same.
- 60 Doctor Daunivalu outlined the following in her findings;

60.1 That History related by the person to be examined so on the 22nd of November at around 6pm. She met with an I Taukei male and used his phone. He asked her to sleep over which she consented, later that night he took off her clothes and kissed her and kissed her arms. He put his finger on her vagina and leaked her vagina too. She did not consent to this

60.2 That the victim was Unaisi. Generally looking at her she appears calm she was not distressed in any form not even anxiety.

60.3 That particularly on the findings there were hymen injuries there were red and tender. As specific location which was 2 o'clock and 4 o'clock and the injuries appears as a tear. However there were no discharge, no bleeding or any abnormal discharge noted. There were also injuries we would say abnormal physical examination found on the urethra. Which I had notified that it appear red in flamed and tender to touch.

60.4 That tears would result in most likely in unconsented sexual act given the nature of the person not consenting to the sexual act. What was done in anyway and this would actually result in a hymen of tear and when we consider the hymen we considered as a structured that is more sole and internal structure of the genitalia. This would include the hymen the vagina and other internal structures of a woman.

60.5 That the 2 o'clock would pointing at the hymen, the 2 and the 4 o'clock would be pointing at the tear that is physical examined on the hymen. So if you look in a clockwise direction so this would be the position that we have mention. And with the tear it appears red and to touch there is also a pain upon touching when we had conducted physical examination

60.6 That in an unconsented sexual act usually the internal structures would be where the injuries visible. When we considered the hymen or the vagina or other internal structures but there are other possibility there are other structures external genitalia that is also affected. But in this case given the time that she had appeared and he time the physical examination

60.7 That this is a penetrative injury.

60.8 That this is an estrogenized hymen injuries still in healing stages. Estrogenized hymen given the age of the child when she appeared I believe she was 14. There were hormonal changes that give us an indications that she was at her puberty ages and this appearance the external genitalia would look to appear moist. But not like I had mention you are not discharging any discharged. But they were hymen injuries that were visible even after this how many days.

60.9 That It can take up to 5 days a week or even two weeks if there are no complications following in the sexual event or sexual assault.

60.10 That the physical examination findings is consistent with injuries on the hymen and this is consistent with the sexual history that was given from the victim?

60.11 that When you say penetrative blunt force in any form of sexual act which means fingering and Blunt force, fingering the use of penis or male genitalia, penis vaginal sex.

60.12 In cross examination the doctor confirmed that a consensual licking of a vagina would not really resulted into tear the vagina.

60.13 During cross examination it was suggested to the doctor that the penetration in this case was solely caused by penial penetration. The doctor answered that it could also include fingering as well.

60.14. When re-examined the witness confirmed that the serious grave injuries could also caused by fingering as well. The injuries may be visible on the 8th day depending on the depth of the force of fingering. She further said that recovery of genital injuries in children with 4 to 5 days is not a fixed time, the healing time depend on case by case basis.

DIRECTION ON EXPERT EVIDENCE

61 This court has heard the evidence of Dr. Daunivalu who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.

62 An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.

63 This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.

64 This was the prosecution case.

At the end of the Prosecution's case, Defence Counsel made an application for no case to answer on Count 4 of the information on Sexual Assault. After minding the evidence presented, I find that there is no admissible or reliable evidence on Count 4 for the same and I find that there is no case to answer on the same Count 4,

But pursuant to Section 231 (1) (b), I find that there is evidence on the elements of the offence of Counts 1, 2 and 3. I will now put election to the accused whether he wishes to call witnesses in this case or he want to remain silent or do you want to give evidence in this case.

The accused was given his three options

65. The accused opted to remain silent.

PREVIOUS INCONSISTENT STATEMENT

66. During cross examination of the complainant Defense counsel had questioned the witness about the inconsistency in her police statement which she had given to the police when facts were still fresh in her mind with their evidence in court.

67 The complainant "UR" during cross examination denied that she was roaming around town till 7pm after meeting Abdul her boyfriend. Whilst the complainant in her evidence stated that she was in Korovuto. She than was shown her statement dated 24.11.21, she than read the relevant paragraph which states "I did not go home on Tuesday I just roam around in town". She agreed that there are two versions. Obviously, the inconsistency does not affect the elements of the offence. Secondly, the complainant stated that she told Police that she was in Korovuto and the same was reflected in her statement.

68 The Court of Appeal In Lulu v State [2016] FJCA 154; AAU0043.2011 (29 November 2016) made an important observation on paragraph 14 Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280) (an appeal from a conviction for

rape) demonstrated vividly the behaviour of witnesses in similar circumstances as follows.

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) the powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another; (4) It is unrealistic to expect a witness to be a human tape recorder; (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the ‘time sense’ of individuals which varies from person to person. (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up, when interrogated later on; (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts; get confused regarding sequence of events, or fill up details from imagination on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.”

- 69 The inconsistency or omission between her evidence in court and her police statement was not significant to adversely affect the credibility of the complainant. The complainant was not shaken as to the basic version of her allegations. She was consistent in her evidence as well.
- 70 This court is allowed to take into consideration the inconsistencies or omissions between what the witnesses told the court and her police statement when considering whether this witness was believable and credible. However, the police statement is not evidence of the truth of its contents. It is obvious that passage of time can affect one’s accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
- 71 If there is any inconsistency or omission, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witnesses. If it is significant, then it is for this court to

consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence. In this case I find that the inconsistency does not affect the elements of the offence. Secondly, the complainant stated that she told Police that she was in Korovuto and the same was reflected in her statement.

RECENT COMPLAINT EVIDENCE

- 72 In Cross examination the complainant "UR" was questioned as to why she did not complaint to her boyfriend, she replied said that she did not complaint to her boyfriend because she did not trust him and she also did not complainant to her friend Sainimere or Sainimere's parents because she was of the view that they won't believe her.
- 73 Complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
- 74 A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight would be given to the fact that the complainant told her mother immediately after the alleged incident that the accused had done something bad to her. This is commonly known as recent complaint evidence.
- 75 The evidence given by her mother Tirisa Qorotabua is not evidence of what actually happened between the complainant and the accused since this witness was not present and did not see what had happened. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness.
- 76 I accept that whatever the complainant told her mother was enough to alert Tirisa Qorotabua that something wrong had happened to her daughter. There is no legal requirement that a complainant is supposed to tell every detail of what he or she has encountered to the person complained to.

77 The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. It is not expected that a child of 14 years or anyone for that matter who has had an unexpected sexual encounter to give every detail of the accused unlawful sexual conduct to the person the complaint is relayed to.

78 In this case Tirisa was relayed crucial information that the accused had done something bad to her daughter. I also accept the observations of Tirisa that the complainant was silent, distressed and that the accused had done something bad to her.

79 The Supreme Court in *Anand Abhay Raj vs. The State, CAV 0003 of 2013 (20th August, 2014)* at paragraph 38 made an important observation about the above as follows:

"The 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".

80 I accept the evidence of all the prosecution witnesses as reliable and credible.

ANALYSIS

81 The prosecution alleges that on between the 22nd and the 23rd November, 2021 the complainant who was 14 years of age who had ran away from her home after being smacked by her mum was invited by the accused a 49 year old man who was employed as a security at Bulachino to seat at a chair where the accused was on duty. The complainant had first come into contact with the accused when she asked if she can use his mobile phone to call a taxi. The accused lend his phone to the complainant and she made the call.

82 The taxi was busy and the complainant sat at a chair at Bulachino which the accused gave her. The accused was also questioning the complainant on her background details and whether she has a boyfriend or not. It was getting dark and it was during curfew hours. The accused also entertain the complaint by buying Blitz ice cream and Potatoe chips for them to eat whilst talking to her.

83 The accused invited the complainant to a room inside Bulachino. The accused spread pieces of carton on the floor for them to sleep on. The complainant lay down and the accused lay beside her. Whilst laying down she could feel the accused kissing her on her forearms. The complainant than moved to the side

away from the accused. Whilst looking up she saw the accused without any pants. The accused kissed the complainants shoulder neck area and chest area. The complainant moved to the side away from the accused when he was kissing her because she was scared

- 84 The accused then licked complainant's vagina. The complainant was moving backwards and pushing the accused head away from her vagina. The reason why she was moving backwards and pushing the accused head away from her vagina was because she did not like what the accused was doing to her which is a clear indication that she was not consenting and at the same time the accused knew that the complainant was not consenting. The accused licked the complainant vagina for about five minutes.
- 85 The accused inserted his hand into her vagina after leaving his vagina. The complainant was in great pain moved backwards when the accused inserted his hand into her vagina. The complainant did not scream for help because she was afraid of the accused that the accused might kill her.
- 86 The complainant left Bulacchino the next morning after the accused gave her \$20.00. The complainant left to town and met her boy Friend namely Abdul. When questioned why did not inform her boyfriend what the accused had done to her. She stated that she did not trust her boyfriend.
- 87 The complainant also did not inform her friend Sainimere or her friend parents on what the accused had done to her on the night before because she thought they will not believe her.
- 88 The complainant told her mother that the security at Bulachinno had done something bad to her on the 24th of November 2021. The complainant's mother took the complainant to Namaka Police Station where the report was made.
- 89 On the 30th of November 2021 medical examination was conducted by Doctor Daunivalu at Medical Services Pacific, Lautoka and a medical examination report was tendered as part of the prosecution's. *When the witness re-examined confirmed that the serious grave injuries could also cause by fingering as well. The injuries may be visible on the 8th day depending on the depth of the force of fingering. She further said that recovery of genital injuries in children with 4 to 5 days is not a fixed time, the healing time depend on case by case basis.*

DETERMINATION

- 90 I again wish to remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
- 91 For Count one, I would like to state that the important issue that needs to be determined in respect of Count One of Sexual Assault that is whether the act of kissing the complainant on the shoulder, neck area and chest area right to her forearm and stomach was indecent and unlawful.
- 92 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.
- 93 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. If an accused touches the complainant’s body or uses in a way which clearly gives rise to a sexual connotation that is indecent.
- 94 The complainant in her evidence in chief confirmed that she did not like what the accused was doing to her and maintained that she did not enjoy it she stated that she moved away to the side and pushed the accused head when the accused was kissing her. This is a clear indication that the accused knew that the complainant did not like it but the accused went on to kiss the complainant a child 35 years younger than him.
- 95 The Court is of the view that the State has proven all the elements of the Sexual Assault for the first Count.
- 96 For the second count of Rape, The particulars of the offence reads; The accused person Jone Lutui between the 22nd day of November 2021 and the 23rd of November 2021, Penetrated the vagina of “UR” the complainant with his tongue without her consent and at the time of the alleged offence the accused Jone Lutui knew that “UR” was not consenting.
- 97 There is no dispute on the issue of the identity of the accused. However, the issues that needs to be determine with respect of Count 2 rape are “penetration and consent”. For penetration the complainant in her evidence has only stated that the accused licked her vagina for five minutes. She has not elaborated

further into her evidence to confirm whether the tongue of the accused penetrated into the vagina of the complainant or not. Doctor Daunivalu in her evidence when cross examined by defense counsel confirmed that mere licking of the vagina cannot amount to a tear in the hymen. Thus, the court is fully aware that mere degree of penetration is sufficient but nothing as such came from the prosecution. Hence, there are no other evidence by prosecution to suggest that the accused penetrated his tongue into the vagina of the complainant. The Court is of the view that the State was unable to prove the element of penetration on the second count of Rape.

98 However, the law is clear on section 162 (1)(f) of the Criminal Procedure Act 2009 is clear that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard, I direct myself that this court finds the accused not guilty of the second count of rape but guilty of the offence of sexual assault.

99 For the third Count of Rape, Again there is no dispute as to the issue of identification. The particulars of the offence reads; The accused person Jone Lutui between the 22nd day of November 2021 and the 23rd of November 2021, Penetrated the vagina of “UR” the complainant with his finger without her consent and at the time of the alleged offence the accused Jone Lutui knew that “UR” was not consenting.

100 The complainant “UR” in her evidence in chief stated that the accused inserted his hand into her vagina. The Court believed “UR” the complainant when she stated that the accused inserted his hand into her vagina, the complainant was referring to the accused inserting his finger into her vagina. Secondly, the complainants evidence was supported by her medical report where Doctor Daunivalu who confirmed in her evidence the following:

- i) *that the physical examination findings is consistent with injuries on the hymen and this is consistent with the sexual history that was given from the victim?*
- ii) *During cross examination it was suggested to the doctor that the penetration in this case was solely caused by penial penetration. The doctor answered that it could also include fingering as well.*
- iii) *In re-examination she stated that the serious grave injuries could also caused by fingering as well. The injuries may be visible on the 8th day depending on the depth of the force of fingering. She further said that recovery of genital*

injuries in children with 4 to 5 days is not a fixed time, the healing time depend on case by case basis.

- 101 On the issue consent there are evidence from the complainant that she was in great pain and was moving backwards when the accused inserted his finger into her vagina. The complainant was pushing the head of the accused away and she did not scream for help because she was afraid of the accused that he might kill her. These acts by the complainant is a clear sign post that she was not consenting to the accused penetrating his finger into her vagina. Thus, confirming that the accused knew or was reckless that the complainant was not consenting to the accused penetrating her vagina with his finger.
- 102 The State has proven that the complainant did not consent to the accused penetrating her vagina with his finger.

CONCLUSION

- 103 This court is satisfied beyond reasonable doubt that the accused between the 22nd and 23rd of November 2021 unlawfully and indecently kissed the complainant on the shoulder, neck area and chest area right to her forearm and stomach.
- 104 This Court is not satisfied beyond reasonable doubt that he accused person Jone Lutui between the 22nd day of November 2021 and the 23rd of November 2021, Penetrated the vagina of "UR" the complainant with his tongue without her consent and at the time of the alleged offence the accused Jone Lutui knew that "UR" was not consenting. The Court is satisfied that the accused is not guilty of that offence Rape however, the accused is guilty of a lesser offence. The Court finds the accused guilty of Sexual Assault for the second count.
- 105 The court is satisfied beyond reasonable doubt that he accused person Jone Lutui between the 22nd day of November 2021 and the 23rd of November 2021, Penetrated the vagina of "UR" the complainant with his finger without her consent and at the time of the alleged offence the accused Jone Lutui knew that "UR" was not consenting.
- 106 In view of the above, I find the accused guilty of first count of Sexual Assault. Not guilty on the second count of rape but guilty on a lesser count of Sexual Assault and guilty on the third count of Rape and I convict the accused accordingly for the same. The accused is acquitted accordingly on count 4 Sexual Assault on the information.

107 The decision of the Court are as follows;

1st Count – Sexual Assault- Guilty

2nd Count – Rape Not Guilty but guilty on a lesser count of Sexual Assault

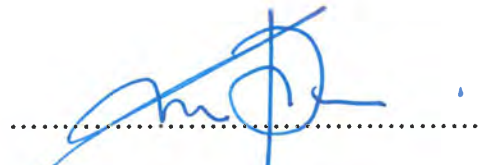
3rd Count – Rape – Guilty

4th Count – Sexual Assault- Acquitted.

This is the judgment of the court



High Court – Lautoka
Friday 5th April 2024


Sekonaia V. Vodokisolomone
Acting Puisne Judge