IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 039 of 2024

STATE

V

TANIELA KASA

Counsel	:	Ms. S. Swastika and Ms. R. Pai for the State.
	:	Ms. K. Vulimainadave and Ms. M. Totovasau for the Accused.
Dates of Hearing	:	11, 12, 13 November, 2024
Closing Speeches	:	14 November, 2024
Date of Judgment	:	15 November, 2024

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "V.T")

1. The Director of Public Prosecutions charged the accused by filing the following amended information dated 11th November, 2024:

FIRST COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

TANIELA KASA, on an unknown date in 2022 at Suva, in the Central Division, unlawfully and indecently assaulted "V.T", by licking her vagina.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1), (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

TANIELA KASA on an unknown date in 2022 at Lautoka in the Western Division, penetrated the vagina of "V.T", a child under the age of 13 years, with his penis.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

TANIELA KASA on an unknown date in 2023 at Lautoka in the Western Division, penetrated the vagina of "V.T", a child under the age of 13 years, with his penis.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

TANIELA KASA on the 20th of February, 2024 at Lautoka in the Western Division, penetrated the vagina of "V.T", a child under the age of 13 years, with his finger.

FIFTH COUNT

Statement of Offence

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

Particulars of Offence

TANIELA KASA on 22nd of February, 2024 at Lautoka in the Western Division, penetrated the vagina of "V.T", a child under the age of 13 years, with his penis.

2. In this trial, the prosecution called five witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for two counts of rape being counts three and five. There was no evidence in respect of counts one, two and four.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

4. The accused is charged with more than one offence, the evidence in respect of each offence will be considered separately from the other if the accused

is guilty of one offence, it does not mean that he is guilty of the others as well. This also applies with the findings of not guilty.

ELEMENTS OF THE OFFENCE

RAPE

5. To prove counts three and five the prosecution must prove the following elements of the offences of rape beyond reasonable doubt:

   (a) The accused;
   (b) Penetrated the vagina of the complainant with his penis ;
   (c) The complainant was below the age of 13 years.

6. The slightest of penetration of the complainant's vagina by the accused's penis is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case, the complainant was 11 years at the time of the alleged offending and therefore the consent of the complainant is not an issue in regards to these counts.

7. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.

8. The second element is the act of penetration of the complainant's vagina by the penis.

9. The final element of the offence is the age of the complainant. It is not in dispute that the complainant was 11 years of age during the period of the allegation which establishes that she was below the age of 13 years at the time of the alleged incidents.

10. In this trial, the accused denied committing the offences of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis as alleged.

11. This court must be satisfied that the prosecution has proved all the elements of the offences of rape beyond reasonable doubt in order for this court to find the accused guilty. If on the other hand, this court has a reasonable doubt with regard to any of those elements concerning the offences, then this court must find the accused not guilty.

12. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

13. In this trial, the prosecution and the defence have agreed to certain facts titled as agreed facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.

14. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

15. The complainant informed the court that she is 11 years of age and is educated up to class 6. In the year 2023 she was living with her father (the accused), her mother and grandmother at her grandmother's house. One day the complainant went to the toilet, when she opened the door to come out the accused pushed her inside.

16. The complainant shouted so the accused removed his t-shirt and covered her mouth. Thereafter the accused open the complainant's sarong (sulu) removed her panty took out his balls and put it in her "mimi" when questioned what are the balls and the "mimi" used for. The complainant said to urinate, upon further questioning the complainant stated that the accused had inserted his balls inside her "mimi". When the accused did this the complainant got scared, at this time both the complainant and the accused were standing. According to the complainant this happened for about 1 minute.

17. The accused stopped when the complainant's mother started calling the complainant, the accused removed his t-shirt from the complainant's mouth and left. The complainant went to her mother and told her that her father was harassing her inside the toilet.

18. Furthermore, on a Friday in February, 2024 the accused, the complainant's mother and a cousin were drinking. After a while her mother and the cousin left so the complainant, her eldest sister Etelia and her bothers Waitaqa and Junior went to sleep at their grandmother's house since it was night time. After sometime the accused came and asked the complainant where her mother was.

19. The accused told the complainant and her younger brother to sleep at home while he went to look for their mother. After sometime the accused came inside the house and pulled the complainant underneath the bed. Upon seeing this, the complainant's brother started to cry and ran outside. The complainant was face down so the accused turned her upwards and then he laid on the complainant. Shortly after, the accused removed the complainant's and his trousers and started rubbing his balls to her "mimi" for a long time until he ejaculated. Whilst this was happening the bedroom door opened and Etelia came into the room with a torch and showed the torch light under the bed on her father.

20. The accused moved away and lay beside the complainant, at this time the complainant came out from under the bed and went to her aunt Kini's house. The complainant told her aunt that her father came in the house and pulled her underneath the bed. The next day the complainant with her aunt Kinisimere and Etelia reported the matter to the police. When asked to clarify what the complainant meant by balls in a male anatomy the complainant was able to show and mark the penis in the picture which she had referred to as the balls of her father. The complainant was able to recognize the accused in court.

21. In cross examination the complainant agreed that in the year 2023 she was living in Lautoka with her parents and siblings in their new house. The complainant agreed that her father did not insert his balls inside her "mimi" but was simply rubbing her "mimi" with it.

22. The complainant denied that her aunt Kinisimere had told her to tell the police about what she told the court happened in 2023/2024. The complainant stated that what she told the court had really happened and it was the truth.

23. In re-examination the complainant stated that her father had rubbed his penis to her "mimi".

24. The elder sister of the complainant Etelia Sauca informed the court that the accused is their father. In the early morning of 23rd February, 2024 the witness had left her grandmother's house to go home. Upon reaching her house the witness noticed that the lights were off, she entered the house took a torch and went into the bedroom of her parents.

25. As soon as she entered the room from the torch light she saw her father and the complainant beside the bed on a mattress naked. Upon seeing this, the witness said *"dad what's that"* the accused swore at the witness and told her to get out. The witness ran and told her grandmother and on the same day the matter was reported to the police. The witness went to the police station with the complainant and her aunt Kinisimere. The witness recognized her father in court.

26. In cross examination the witness stated that the torch light was bright. When it was suggested that she was mistaken about seeing her father and her sister on the same mattress, the witness did not agree and said *"it was my father and my sister on that mattress"*. Moreover, the witness also denied that she had assumed that her father and her sister were naked. When it was suggested that she had rushed outside so she did not get a chance to see the entire bedroom the witness responded *"I just walked slowly went straight outside to my grandmother's place."*

27. The witness denied that her aunt Kini had influenced her to tell the police that she had seen her father and sister naked on the mattress. The witness stated that she told the police what she had seen. The witness denied the suggestion that she had only seen her father lying on the mattress in that

room. The witness maintained that she had seen her father and her sister that morning.

28. Kinisimere Tinai the aunt of the complainant informed the court that on 23rd February, 2024 she was at home when Etelia came and told her what she had seen in the bedroom of her house. The witness called and asked the complainant about what her dad had been doing. The witness had observed that the complainant was shaking and crying. The complainant told the witness that while she was lying down in the sitting room her father carried her into the bedroom and removed her clothes. The witness upon hearing this asked the complainant if she was willing to go to the police station to which the complainant agreed. When questioned what else the complainant had told her the witness stated that the complainant was just crying.

29. In cross examination the witness denied the complainant had given her police statement in her presence while she was sitting beside the complainant at the police station. The witness also denied influencing the complainant and Etelia to falsely implicate the accused. The witness is not related to the accused but knows him after he came to stay with her for a short time.

RECENT COMPLAINT DIRECTION

30. 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.

31. 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 is to be given to the fact that on 23rd February, 2024 the complainant told her aunt Kinisimere, that while she was lying down in the sitting room her father carried her into the bedroom and removed her clothes. The complainant was crying and shaking so was unable to continue any further but was willing to report the matter to the police.

32. This is commonly known as recent complaint evidence. The evidence given by Kinisimere is not evidence of what actually happened between the complainant and the accused since Kinisimere was not present and she did not see what had happened.

33. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant was in a vulnerable and helpless situation, however, she was able to tell her aunt relevant and important information to alert her aunt that the accused had inappropriately abused her.

34. The prosecution is asking this court to consider the fact that the complainant was only 11 years of age when the abuse was happening to her. The prosecution is also relying on the distressed situation of the complainant hence the complainant was unable to give all the details of her father's abuse to Kinisimere. The fact that the complainant without

hesitation agreed to report the incident to the police shows that the complainant is likely to be truthful.

35. On the other hand, defence says the complainant made up the false allegation against the accused. She gave a version of events to Kinisimere which does not make sense and a totally different version in court. The defence also states that this court should consider that there are different versions which shows the complainant was not consistent hence she was making up a story against the accused and therefore she should not be believed.

36. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is for this court to decide whether the complainant is reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.

37. The investigating officer Cpl. Meredani Nasa informed the court that she was able to obtained the original birth certificate of the complainant which was marked and tendered as prosecution exhibit no. 1.

38. The final prosecution witness Dr. Li Quang Yin informed the court that she graduated with an MBBS degree and post graduate diploma in emergency medicine from the Sania Seno Medical Sciences in China. She has 8 ½ years experience as a Medical Practitioner post internship. Currently the witness is based at the Lautoka Aspen Hospital as a Senior Medical Officer.

39. On 23rd February, 2024 the witness had examined the complainant at the Lautoka Aspen Hospital. The witness had carried out a detailed head to toe examination of the patient in the presence of the staff nurse. In appendix 1 the witness had drawn a diagram to illustrate her findings. Upon vaginal examination of the patient the witness noted the following specific medical findings:

a) Labia minora and fossa navicularis appeared a bit red;
b) Hymen was irregular shaped and not intact;
c) Whitish discharge was noted at the vaginal opening.

40. The witness explained the labia minora is the inner lip of the vagina and the fossa navicularis is the area that's posterior (back) extending into the perineum to the anus. Both labia minora and the fossa navicularis appeared a bit red like it was rubbed. In respect of the redness the witness stated that it can be caused by light trauma, hard rubbing, hitting something against it, horse riding, sitting at the back of a motor bike or vigorous sporting activity. In the professional opinion of the witness there was a vaginal penetration about 24 hours ago which was consistent with the patient's history and there was a possibility the hymen may break if the vagina is rubbed with the penis for a long time. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 2.

41. In cross examination the witness stated that the hymen is a soft thin tissue which can be rubbed away by horse riding and vigorous sporting activities. The witness also stated that wearing tight pants could also cause reddening seen in the patient but not by wearing tight trousers which would only cause scarring.

42. In re-examination the witness stated that she did not see any scarring in the patient.

DIRECTION ON EXPERT EVIDENCE

43. This court has heard the evidence of Dr. Yin 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.

44. 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.

45. The 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.

46. This was the prosecution case.

DEFENCE CASE

47. At the end of the prosecution case, the accused was explained his options. He chose to remain silent and did not call any witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent and not call any witness.

48. From the line of cross examination the defence took the position that the accused did not do anything to the complainant and both the allegations are false and a made up story against him. Kinisimere had influenced the complainant and Etelia to make a story against the accused by lying to the police. The accused did not do anything to the complainant as alleged in the toilet or in the house. The narration of the complainant is improbable because it is a lie. The complainant also lied when she said she told her mother about the toilet incident. The defence is asking this court to consider the fact that had the complainant told her mother there would have been evidence of the mother's response which is not before the court.

49. The defence is also asking this court to consider the fact that Kinisimere did not say anything in detail about what had happened in the house because nothing had happened.

50. In addition to the above, Etelia was mistaken when she said she saw her father on the mattress with the complainant naked, firstly the torch light was not sufficiently alight to identify the accused and also the fleeting manner in which Etelia had moved the torch was impossible to correctly identify anyone. Finally, the fact that Etelia ran out of the house to her grandmother's house shows that she was in a rush to leave and therefore Etelia's evidence is unreliable.

51. This was the defence case.

ANALYSIS

52. The prosecution states that the complainant (11 years of age) and the accused are known to each other. The complainant is the biological daughter of the accused and both lived together with other family members at Vunato.

53. One day in the year 2023 at her grandmother's house the complainant went to the toilet, when she opened the door to come out the accused pushed her inside. The complainant shouted so the accused removed his t-shirt and covered her mouth. Thereafter the accused open the complainant's sarong removed her panty took out his penis and inserted it inside her vagina for about one minute whilst both were standing. When the accused did this the complainant got scared. The accused stopped when the complainant's mother started calling the complainant.

54. The second incident happened on a Friday in February, 2024 the complainant, her elder sister Etelia and her bothers Waitaqa and Junior went to sleep at their grandmother's house since it was night time. After sometime the accused came and asked the complainant to come home.

55. When the complainant and her younger brother went home the accused told the complainant and her younger brother to sleep at their house while he went to look for their mother. After sometime the accused came inside the house and pulled the complainant underneath the bed. Upon seeing this, the complainant's brother started to cry and he ran outside. The complainant was face down so the accused turned her upwards and then he lay on the complainant. Shortly after, the accused removed the complainant's and his trousers and started rubbing his penis on the complainant's vagina until he ejaculated. At this time Etelia came into the

bedroom with a torch and showed the torch light under the bed on the accused.

56. The accused moved away and lay beside the complainant, at this time the complainant came out from under the bed and went to aunt Kini's house. The complainant told her aunt about what the accused had done. The complainant with her aunt Kinisimere and Etelia reported the matter to the police.

57. The prosecution submits that there is no mistake made by Etelia in recognizing the accused. Etelia had seen the accused and the complainant naked on the mattress in the bedroom from the torch light she was carrying at the time. The prosecution is asking this court to draw an inference from what Etelia had seen. Immediately after the second incident the complainant told her aunt Kinisimere about what the accused had done. In respect of the first incident the complainant did tell her mother but her mother did not do anything. The complainant promptly reported the matter to the police after the second incident and was medically examined the same day.

58. Finally the doctor had carried out a detailed examination of the complainant. In the professional opinion of the witness there was vaginal penetration about 24 hours ago and there was also a possibility that the hymen may not be intact if the vagina is rubbed with the penis for a long time.

59. On the other hand, the defence says the allegations are false initiated against the accused by the complainant's aunt Kinisimere to the extent that Kinisimere was able to influence the complainant and her elder sister Etelia to say what Kinisimere wanted. The accused did not do anything to

the complainant as alleged. What the complainant and Etelia narrated in court was not possible and/or probable and therefore they should not be believed.

60. The complainant also lied when she said she told her mother about the toilet incident when she had not. The defence is asking this court to consider the fact that had the complainant told her mother there would have been evidence of the mother's response which is not before the court.

61. The defence is also asking this court to consider the fact that Kinisimere did not say anything in detail about what had happened in the house because nothing as mentioned by the complainant had happened. There is a glaring inconsistency between what the complainant told the court and the evidence of the recent complaint witness Kinisimere.

62. Etelia was mistaken when she said she saw her father on the mattress with the complainant naked in the darkness of night when the single headed torch light was not sufficiently alight to identify the accused and also the fleeting manner in which Etelia had moved the torch was impossible to correctly identify anyone. Finally, the fact that Etelia ran out of the house to her grandmother's house shows that she was in a rush to leave and therefore Etelia's evidence is unreliable.

63. The evidence of Etelia and the complainant are also inconsistent with each other about the observations of Etelia and what the complainant told the court in respect of being underneath the bed when Etelia entered the bedroom. The defence is also asking this court not to believe the medical report of the complainant since the findings of the doctor is not conclusive.

64. Finally, the defence submits that what the complainant told the court does not make sense and is riddled with doubt. The defence is asking this court

not to believe the complainant and Etelia who are furthering the vested interest of their aunt Kinisimere.

DETERMINATION

65. At the outset I would like to mention that the evidence of the complainant not related to the offences mentioned in the information filed has been disregarded completely. I would like to once again 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.

66. In this case, there are two different versions, one given by the prosecution and the other by the defence as part of their case strategy. This court must consider all the evidence adduced and the defence case theory to decide whether the prosecution has proven beyond reasonable doubt that the accused committed the offences alleged.

67. This court has kept in mind the following factors when determining the credibility and reliability of a witness such as promptness/spontaneity, probability/improbability,consistency/inconsistency,contradictions/omis ions, interestedness/disinterestedness/bias, the demeanour and deport ment in court [and the evidence of corroboration where it is relevant] see *Matasavui v State [2016] FJCA 118; AAU0036.2013 (30 September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).*

68. I have also kept in mind the observations made by Prematilaka RJA sitting as a single judge of the Court of Appeal in *Josaia Naikalivou vs. The State, AAU 017 of 2022 (26th March, 2024)* at paragraph 9 as follows:

In Murray v The Queen (2002) 211 CLR 193 at 213 [57] Gummow and Hayne JJ, in the High Court of Australia made it clear that it is never appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt. In R v Li (2003) 140 A Criminal R at 288 at 301 it was again held that the issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth. This seems to be what exactly the trial judge had done in the judgment.

69. The defence argument apart from denial is that there was a motive on the part of the complainant's aunt Kinisimere to influence the complainant and Etelia to make false allegations against the accused.

70. In respect of the above contention, I have directed my mind to the *Jovanovic* direction to remind myself that an accused has no burden to prove a motive or reason for a complainant to lie.

71. The Court of Appeal in *Rokocika v The State [2023] FJCA 251; AU0040.2019 (29 November 2023)* from paragraphs 32 to 34 made a pertinent observation in respect of the above as follows:

In R v Jovanovic (1997) 42 NSWLR 520 Sperling J set out a draft direction that emphasised that:

"It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no

apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about'.

[33] The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:

'If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: Jovanovic v R at 523.

[34] NSW Criminal Trial Courts Bench Book also states that:

'A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: South v R [2007] NSWCCA 117 at [42]; MAJW v R [2009] NSWCCA 255 at [31].'

72. There is no dispute that the accused is the biological father of the 11 year old complainant and both were living together. Before proceeding any further it is important to resolve the issue of whether the evidence of the complainant that the accused balls meaning his penis had penetrated the

complainant's "mimi" which is where she urinates from meets the requirements of section 207 of the Crimes Act 2009.

73. At the time of the allegations the complainant was 11 years of age and educated up to class 6. From the evidence before the court there is undisputed evidence of the complainant that she meant "mimi" to be her vagina. Considering the age and the education level of the complainant there is no doubt in my mind that the complainant had used a different terminology to describe the vagina which is understandable.

74. The Court of Appeal in *Vilikesa Volau v State [2017] FJCA 51; AU0011.2013 (26 May 2017)* at paragraph 14 made a pertinent observation in respect of the above as follows:

> *14. ...It is naïve to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.*

TURNBULL DIRECTIONS

75. Although this is a case of recognition as opposed to identification the defence has taken the position that the complainant's elder sister Etelia made a mistake in thinking that it was the accused who was with the complainant in the bedroom of the family house for someone else so she had identified the wrong person in court.

76. The defence contention is that the case against the accused in some respect depends on the correctness of the identification of the accused which the defence alleges to be mistaken. I have therefore taken special care on the evidence of identification because it is possible that an honest witness can make a mistaken identification. An apparently convincing witness can be mistaken and so can a number of such witnesses. I wish to also remind myself that mistakes in recognition, even of close friends and relatives, are sometimes made.

77. I have carefully looked at the following circumstances in which Etelia had identified the accused in the bedroom:

a) How long did she have the person Etelia says was the accused under observation?

Etelia is the daughter of the accused and she was living with the accused and the complainant. Etelia did not say for how long the accused was under her observation but she did say that she was able to see the accused in the torch light to the extent that she even said *"dad what's that"* and the accused had sworn at her and told her to get out.

b) At what distance?

According to Etelia as she entered the bedroom she immediately saw the accused and the complainant on the mattress in the bedroom. This suggests Etelia was standing at close proximity of the accused and the complainant.

c) In what light?

According to Etelia the torch light was bright enough to recognize the complainant and the accused.

(d) Did anything interfere with that observation?

Etelia did not say there was any obstruction or interference she maintained that she had seen the accused and the complainant naked on the mattress.

(e) Had the witness ever seen the accused before?

Etelia is the elder sister of the complainant and the biological daughter of the accused they were living together.

78. I must remind myself of the following specific weaknesses which appeared in the identification/recognition evidence of Etelia. She did not say for how long she had the accused and complainant under observation and from what distance.

79. I have given the above directions as a matter of caution after the defence counsel raised the issue of identification of the accused in the bedroom by Etelia.

80. Based on the above guidelines I would like to state that Etelia did not make a mistake in recognizing the accused. Etelia had seen the accused in their house with the complainant where Etelia, the accused and the complainant with other family members were living.

81. In view of the above, this court accepts that it was the accused and the complainant who were seen by Etelia in the bedroom and there was no mistake made by Etelia in the recognition of the accused.

82. After carefully considering the evidence adduced by the prosecution and the line of defence put forward by the accused, in respect of the incident in 2023 I believe the evidence of the complainant that it was the accused who

had rubbed his penis on her vagina without inserting it as a truthful and a reliable account of what the accused had done.

83. In respect of the second incident in February, 2024 I also accept the evidence of the complainant that the accused had rubbed his penis on her vagina for a longtime. However, I am also alert to the fact that in respect of this count being count five the complainant did not say anything whether the penis of the accused had penetrated her vagina. In this regard I draw my mind to the fact that in reality it is not expected of an 11 year old child who is undergoing an unexpected forceful sexual encounter to say with any certainty about the extent of the penetration.

84. The Court of Appeal in *Alfred Ajay Palani vs. The State, criminal appeal no. AAU 111 of 2020 (26 July, 2024)* at paragraph 28 has summed up the above proposition as follows:

The fact that the victim's hymen was intact shows that she was a virgin until and after she was forced to undergo this distasteful sexual experience. Would it be reasonable for any rational mind to expect a 14 year old girl experiencing an act of forceful sexual penetration, most likely for the first time in her life, to describe the act to a mathematical accuracy differentiating vaginal and vulva penetration?; to be more precise, how far the penis went inside her genitalia; whether it penetrated her vagina or vulva. Would she know the bodily difference between her vulva and vagina, where vulva ends and vagina begins? I think not.

85. The complainant was unwavering and steadfast in what the accused had done. She was able to recall in a comprehensive manner and explain what had happened. She was also able to withstand cross examination and was not discredited as to the main version of her allegations.

86. In respect of the first incident the complainant in cross examination and also in re-examination confirmed the fact that there was only rubbing of her vagina by the accused penis without any penetration. For the second incident the complainant maintained that the accused had rubbed her vagina with his penis. Furthermore the complainant was coherent and articulate about what she had encountered and I have no doubt in my mind that she told the truth in court.

87. Moreover, experience has shown that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not. The fact that the 11 year old complainant in 2023 did not tell anyone apart from her mother is understandable considering the power of authority held by the accused. The alleged perpetrator was her father who no doubt had authority and control over her. The age of the complainant is also an important consideration in this regard. The behaviour of the accused towards the complainant in the toilet and then in the bedroom in my considered judgment had instilled fear in the complainant.

88. For this reason, it was only when the complainant was away from home that she was able to tell her aunt Kinisimere about what the accused had done although not in detail. I also accept the evidence of Kinisimere that the distraught state of the complainant had stopped the complainant in narrating completely about what had happened to her in the house. What is important is that the information given by the complainant to Kinisimere was enough to alert Kinisimere that the accused had done something inappropriate. As a result Kinisimere was ready to take the complainant to the police station. The fact that the complainant did not tell Kinisimere everything the accused had done should not be taken against the complainant.

89. I have also taken into account that it is not expected of a 11 year old child who has had an unexpected sexual encounter to tell anyone she meets every detail about what had happened to her.

90. The observations of the Supreme Court in *Anand Abhay Raj vs. The State, CAV 0003 of 2013 (20th August, 2014)* at paragraph 39 is crucial here:

The complainant need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.

91. What the complainant told Kinisimere was material and relevant to the unlawful sexual conduct of the accused. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. In *Raj's* case (supra) the Supreme Court at paragraphs 37 and 38 stated the following about recent complaint evidence:

[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint: Kory White v. The Queen [1998] UKPC 38; [1999] 1 AC 210 at p215H. This was done here.

[38] 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.

92. In any event Etelia had also alerted Kinisimere about what she had seen in the house supports the evidence of the complainant. I also observed that the complainant had a strong view against the conduct of the accused and she had expressed herself clearly about what the accused had done.

93. This court also rejects the defence assertion that Kinisimere had a motive to frame the accused by influencing the complainant and Etelia as far-fetched and unbelievable. Kinisimere is not related to the accused and only knew him for a short time after he came to Lautoka from Narere. In my considered judgment this is an attempt by the accused to divert attention away from the allegations.

94. Kinisimere was also a truthful and honest witness who told the court about what the complainant had told her and her observations of the complainant. Etelia was also a truthful witness who was able to recall what she had seen in her house and had told the same to Kinisimere.

95. In respect of the opinion expressed by the doctor I accept the same that there was reddening seen in the labia minora and fossa navicularis. Although there are many possibilities for the reddening and the hymen not being intact the important point to note is that the complainant had presented herself within 24 hours of the alleged incident. I have completely disregarded the history narrated by the complainant which is contains uncharged acts. The specific medical findings of the doctor cannot be ignored in light of the evidence adduced.

96. In respect of the first incident the complainant was adamant in cross examination and later in re-examination that whilst the accused was rubbing his penis on her vagina for one minute in a standing position there

was no penetration of her vagina which means the element of penetration in respect of this count is not satisfied.

LATE REPORTING

97. Although not raised by the defence there is an issue of late reporting by the complainant to the police in respect of the first occasion in the year 2023. It is impossible to be exact about the delay since the complainant was unable to recall the month of the first allegation. However, without doubt there is a delay. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018)* had explained this issue as follows:

"[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in ***Tuyford*** *186, N.W. 2d at 548 it was decided that:-*

"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay."

"[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the

witness. In the case of Thulia Kali v State of Tamil Naidu; 1973 AIR.501; 1972 SCR (3) 622:

"A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered."

98. Firstly, I would like to state that the accused was a person of authority who had control over the complainant, he was the father of the complainant and both were living together.

99. Secondly, the house was built by the accused and the actions of the accused in my considered judgment had instilled fear in the mind of the 11 year old complainant who did not tell anyone other than her mother who was apparently not responsive to the complainant about what the

accused had done until Etelia had seen the accused naked on the mattress with the complainant and had told Kinisimere.

100. The late reporting in my view was beyond the control of the complainant she was afraid of the accused and when the opportunity presented itself the complainant opened up and expressed herself to her aunt Kinisimere away from home.

101. I accept that the complainant was a victim of circumstances which resulted in delayed complaint to the police in respect of the first incident. Considering the age of the complainant and the nature of the abuse on her it took a while for the complainant to gather the courage to speak out which she eventually did.

102. Prematilaka, RJA sitting as a single judge in the Court of Appeal in *Ram Krishna vs. The State, criminal appeal no. AAU 123 of 2022, (12 April, 2024)* made an important observation about the jurisprudence and the reasoning behind late reporting from paragraph 28 to 33 as follows:

[28] The Doctrine of Recent Complaint: Anti-Feminist Narratives in Evidence Law by Eoin Jackson says:

As noted by the academic Wigmore, the origin of the doctrine of recent complaint lies in the medieval expectation that a victim of rape would raise a 'hue and cry' in order to make the community aware that a violation had occurred. Stanchi, writing in the Boston College Law Review, discusses how this can be linked to the historical mistrust of female witnesses, with the promptness of the complaint being equated to an alleviation of some of this mistrust..... For example, Heffernan has noted how the doctrine continues to operate on the assumption that a victim will report an incident of sexual

assault as soon as is reasonably possible. This ignores a myriad of factors a victim may be feeling, such as fear, humiliation, and intimidation..... A personal connection to the abuser will naturally hinder victims from promptly reporting the incident, given they may need to weigh up the effect reporting the assault has not just on them, but on the relationships within their broader social and familial circle.....The outdated perception that a victim will immediately report a traumatic incident does not take into account the various psychological and personal factors at play and other complexities, in particular those that arise where the victim is familiar with their abuser..... While it is logical for a victim to consult with someone they perceive to be knowledgeable about the matter at hand, yet the doctrine of recent complaint ignores this in favour of a blanket presumption that an immediate disclosure will be made..... The recent complaint doctrine strictly focuses on the idea of reporting as soon as reasonably possible in the context of the mind-set of the victim, as opposed to enquiring as to whether there are any excuses that would justify an otherwise 'unreasonable delay'.

[29] According to Jackson in recent times, the doctrine has been modified to allow for a 'reasonable excuse' justification. This justification would allow for the prosecution to argue that the victim had a reasonable excuse for delaying in making a complaint. In assessing this excuse, the judge could take into account the emotional state of the woman namely that she was not in a psychological state to make a complaint at the first available opportunity, the nature of the relationship between the accused and victim, and the factual context of the charge itself. It would also account for cases where the victim consults with someone they know prior to making a complaint. This justification would allow for a more inclusive version of the doctrine of recent complaint to be embedded into jurisprudence. It would allow for a version of the doctrine grounded in an emphasis and understanding of the complexities that can arise in the aftermath of a sexual assault. It does not remove the time element, but merely adds nuance

sufficient to prevent it from being the determining factor when considering the veracity of testimony.

[30] Australian Law Reform Commission states that: 'The psychological literature shows that delay is the most common characteristic of both child and adult sexual assault. Significantly in the context of this Inquiry, the 'predictors associated with delayed disclosure' reveal differences in reporting patterns depending upon the victim's relationship with the abuser. For example, where the victim and defendant are related, research suggests there is a longer delay in complaint. Since complainants are routinely cross-examined by defence counsel about delays in complaint in ways that suggest fabrication, 'it is likely that evidence about a complainant's first complaint would answer the type of questions that jurors can be expected to ask themselves'.

[31] For example, a Bench of 05 judges of the Supreme Court of Philippines including the Chief Justice in People of the Philippines, Plaintiff-Appellant vs. Bernabe Pareja y Cruz, Accused-Appellant G.R. No. 2021223 quoted the following observations from People v. Gecomo, 324 Phil. 297, 314-315 (1996)4 (G.R. No. 182690 - May 30, 2011) in relation to why a rape victim's deferral in reporting the crime does not equate to falsification of the accusation. 'The failure of complainant to disclose her defilement without loss of time to persons close to her or to report the matter to the authorities does not perforce warrant the conclusion that she was not sexually molested and that her charges against the accused are all baseless, untrue and fabricated. Delay in prosecuting the offense is not an indication of a fabricated charge. Many victims of rape never complain or file criminal charges against the rapists. They prefer to bear the ignominy and pain, rather than reveal their shame to the world or risk the offenders' making good their threats to kill or hurt their victims'

[32] The Court of Appeal in R v D (JA) [2008] EWCA Crim 2557; [2009] Crim LR 591 held that judges are entitled to direct juries that due to shame and shock, victims of rape might not complain for some time, and that 'a late complaint does not necessarily mean it is a false complaint'. The court quoted with approval the following suggested comments in cases where the issue of delay in, or absence of, reporting of the alleged assault is raised by a defendant as casting doubt on the credibility of the complainant. 'Experience shows that people react differently to the trauma of a serious sexual assault. There is no one classic response. The defence say the reason that the complainant did not report this until her boyfriend returned from Dubai ten days after the incident is because she has made up a false story. That is a matter for you. You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint. That is a matter for you.'

[33] Thus, as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fare for the judges to direct themselves that similarly an immediate complaint does not necessarily demonstrate a true complaint. Thus, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint.

LESSER OFFENCE

103. In respect of the 2023 incident count three (rape) this court is not satisfied beyond reasonable doubt that the accused had penetrated the vagina of the complainant with his penis. As the evidence before this court stands, the benefit of the doubt ought to go to the accused. Moreover, this court is satisfied beyond reasonable doubt that the accused had only rubbed his penis on top of the complainant's vagina. 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.

104. However, this is not the case in respect of count five the incident in February, 2024. I have once again carefully examined the evidence in respect of this count of rape as charged and I am satisfied beyond reasonable doubt that the rubbing of the penis on the vagina causing redness to the labia minora and the navicularis shows there was penetration of the vulva by the penis of the accused which is tantamount to rape. The vulva amongst other things includes the labia minora and the vagina. This was mentioned in *Volau's* case (supra)) by the Court of Appeal at paragraph 13:

...It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('public mound' i.e. a rounded fleshly protuberance situated over the public bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

105. In view of the above the offence of rape is complete not only when there is penetration of the vagina but also with the penetration of the vulva. This has been very well explained by the Court of Appeal in *Palani's* case (supra) at paragraph 25 in the following words:

Rape is either carnal knowledge or penetration of the vulva, vagina, anus or mouth, as the case may be [vide section 207(2) (a), (b) and (c)]. According to section 206(4) of the Crimes Act 2009, carnal knowledge is considered complete upon penetration to any extent. Additionally, section 206(5) specifies that carnal knowledge includes sodomy. According to section 207(2) (b) of the Crimes Act, penetration of the vulva, vagina or anus to any extent with a thing or a part of a person's body that is not a penis is rape. This indicates that carnal knowledge involves penetration of the vulva as well as other forms of penetration. Thus, carnal knowledge is complete not only when penetration of vagina occurs but also with penetration of vulva. Therefore, even in the absence of a specific statutory definition of carnal knowledge in the Crimes Act, penetration of the vulva can be interpreted as falling within the scope of carnal knowledge under section 207(2)(a) of the Crimes Act 2009.

106. In the circumstances, this court is satisfied beyond reasonable doubt that the accused had penetrated his penis into the vulva of the complainant in February, 2024. I also note that the information as it stands states penetration of the vagina and not the vulva. When one reads section 207 of the Crimes Act the word carnal knowledge has been used for penile penetration of the vagina. There is no definition given in the Crimes Act for carnal knowledge to include the penetration of the vulva by the penis.

107. In order to overcome this hurdle this court should look at the purpose of the Crimes Act and the public policy and /or the consideration behind this piece of legislation in interpreting the phrase carnal knowledge. To do this one has to read the entire section 207 of the Crimes Act and understand the purpose for which it was legislated in the form it is. The construction of section 207 (2) (b) gives this court every reason to construe in section 207 (2) (a) that any slightest of penetration of the vulva by the penis is

included in the phrase carnal knowledge under section 207 (2) (a) of the Crimes Act.

108. I find comfort in the words of the Court of Appeal in *Palani's* case (supra) at paragraph 26 regarding this:

Moreover, even if there is no statutory definition, it is possible for the courts to interpret carnal knowledge to include penetration of the vulva, especially in the context of sexual offenses aimed at protecting minors or addressing sexual violence. Courts may look at the purpose of the statute and public policy considerations when interpreting the term in the absence of a statutory definition. Given that section 207(2) (b) of the Crimes Act makes penetration of the vulva, vagina or anus to any extent with a thing or a part of a person's body that is not a penis, an act of rape, there is every reason to hold that penetration to any extent (i.e. even the slightest penetration) of vulva by a penis would constitute carnal knowledge under section 207(2)(a) of the Crimes Act and accordingly, it would be an offence of rape in terms of section 207(1) of the Crimes Act.

109. As mentioned earlier the information in count five does not mention anything about penetration of the vulva. Does this mean that this court is stopped from making a determination on the evidence before it? I think not. The evidence speaks for itself and therefore this court is obliged to read in the law that carnal knowledge includes penetration of the vulva which gives the true position of what had transpired in this case. Whilst doing this, I am mindful of the fact that there is no prejudice is caused to the accused whose defence has been of denial. The accused has been competently represented and his defence has not be affected as a result.

110. Although there was an inconsistency between the evidence of the complainant and Etelia whether the accused was underneath the bed with the complainant or with the complainant on the mattress beside the bed is not significant to adversely affect the credibility of the complainant and Etelia. The inconsistency does not go to the root or the essence of their evidence.

111. The Court of Appeal in *Mohammed Nadim and another vs. State [2015] FJCA 130; AAU0080.20 (2 October 2015)* had made the following pertinent observations about the above at paragraph 16 as follows:

> *[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):*
>
> *"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; ... (3) The powers of observation differ from person to person. What one may notice, another may not. ..... It is unrealistic to expect a witness to be a human tape recorder;"*

112. Another pertinent observation was also made by the Court of Appeal in *Joseph Abourizk vs. The State, AAU 0054 of 2016 (7 June, 2019)* at paragraph 107 in the following manner about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made

by the Indian Supreme Court in *State of UP v. M K Anthony (1985) 1 SCC 505*:

> *'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ is some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...'*

113. Moving on, I reject the defence of denial by the accused as not plausible on the totality of the evidence. The defence assertion that the accused had not done anything to the complainant is unworthy of belief.

114. I do not accept the accused did not do anything to the complainant and that the allegations are a concocted story by the complainant's aunt Kinisimere. The evidence of the complainant and Etelia were unshaken and they were able to express themselves clearly.

115. The defence has not succeeded in creating a reasonable doubt in the prosecution case in respect of the lesser offence of sexual assault in count three and the offence of rape in count five.

CONCLUSION

116. This court is satisfied beyond reasonable doubt that the accused on an unknown date in 2023 had unlawfully and indecently assaulted the complainant by rubbing his penis on the vagina of the complainant. This court is also satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse in what he did to the complainant. The act of the accused has some elements of indecency that any right minded person would consider such conduct sexual in nature.

117. This court is also satisfied beyond reasonable doubt that the accused in February, 2024 had penetrated the vulva of the complainant a child under the age of 13 years with his penis.

118. In view of the above, I find the accused guilty of the lesser offence of sexual assault in count three and I also find the accused guilty of one count of rape as per count five and he is convicted accordingly for both the offences. Due to lack of evidence the accused is acquitted of count one sexual assault, and counts two, three and four for the offences of rape.

119. This is the judgment of the court. *

Sunil Sharma
Judge

HIGH COURT OF FIJI
LAUTOKA

*The fact that the complainant was unable to recall the specific date as stated in the information in respect of count five did not cause any prejudice to the accused.

At Lautoka
15 November, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.