

IN THE HIGH COURT OF FIJI AT SUVA

CRIMINAL JURISDICTION

Criminal Case No. HAC 152 of 2023

State vs Navitalai Komaidrakulu Kaiwai

For the State: Ms. P. Mishra
For the Accused: Mr. W. Navuni and Ms. B. Gani

Date of Trial: 5th August to 9th August 2024
Date of Judgment: 24th December 2024

“The name of the complainant is suppressed. Accordingly, the complainant will be referred to as “SNK”

JUDGMENT

1. The Accused is charged on the Amended Information filed on the 5th of August 2024, with 7 counts of Rape contrary to section 207 (1), (2) and (3) of the Crimes Act, and 1 count of Sexual Assault contrary to section 210 (1) (b) (i) of the Crimes Act 2009.

**AMENDED INFORMATION BY THE
DIRECTOR OF PUBLIC PROSECUTIONS**

NAVITALAI KOMAIDRAKULU KAIWAI is charged with the following offences:

**COUNT ONE
[REPRESENTATIVE COUNT]**

Statement of Offence

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

Particulars of Offence

NAVITALAI KOMAIDRAKULU KAIWAI, between the 1st day of January 2021 and 31st day of December 2021, penetrated the vagina of **SNK**, a child under 13 years of age with his finger

COUNT TWO
[REPRESENTATIVE COUNT]

Statement of Offence

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

Particulars of Offence

NAVITALAI KOMAIDRAKULU KAIWAI, between the 1st day of January 2021 and 31st day of December 2021, at Nasinu in the Cetral Division, penetrated the vagina of **SNK**, a child under 13 years of age with his penis.

COUNT THREE
[REPRESENTATIVE COUNT]

Statement of Offence

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

Particulars of Offence

NAVITALAI KOMAIDRAKULU KAIWAI, between the 1st day of January 2021 and 31st day of December 2021, at Nasinu in the Central Division, penetrated the anus of **SNK**, a child under 13 years of age with his finger

COUNT FOUR

Statement of Offence

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

Particulars of Offence

NAVITALAI KOMAIDRAKULU KAIWAI, on an unknown date between the 1st day of January 2023 and 25th day of April 2023, at Nasinu in the Cetral Division, penetrated the vagina of **SNK**, a child under 13 years of age with his penis.

COUNT FIVE

Statement of Offence

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

Particulars of Offence

NAVITALAI KOMAIDRAKULU KAIWAI, on an unknown date between the 1st day of January 2023 and 25th day of April 2023, at Nasinu in the Central

Division, penetrated the vagina of **SNK**, a child under 13 years of age with his finger

COUNT SIX

Statement of Offence

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

Particulars of Offence

NAVITALAI KOMAIDRAKULU KAIWAI, on an unknown date between the 1st day of January 2023 and 25th of April 2023, at Nasinu in the Central Division, penetrated the vagina of **SNK**, a child under 13 years of age with his finger

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

NAVITALAI KOMAIDRAKULU KAIWAI, on an unknown day between the 1st day of January 2023 and 25th of April 2023, at Nasinu in the Central Division, penetrated the anus of **SNK**, a child under 13 years of age with his penis

COUNT EIGHT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (b) (i) of the Crimes Act 2009

Particulars of Offence

NAVITALAI KOMAIDRAKULU KAIWAI on an unknown day between the 1st day of January and 25th April 2023 at Nasinu in the Central Division procured **SNK**, a child under the age of 13 years, to commit an act of gross indecency by forcing her to hold his penis.

2. He has pleaded not guilty to the charges, the parties attended to the pretrial conference and the Admitted Facts were filed on the 4th of October 2023. The PTC checklist was then filed on the 5th of August 2024, on the first date of the Trial.

Agreed Facts

3. Pursuant to section 135 of the Criminal Procedure Act 2009, the parties have filed the following admitted facts, which are taken to be proven without the need to call additional evidence: -

- (i) The child complainant is SNK, date of birth 18 January 2013, 10 years old student of Lot 3 Rarama Road, Makoi.
 - (ii) The Accused is Navitalai Komaidrakulu Kaiwai, 67 years old, unemployed male of Reba Circle, Nadera.
 - (iii) The complainant and the Accused are related and there is a domestic relationship in this matter.
 - (iv) The accused is the complainant's paternal grandfather.
 - (v) The complainant attends Class 5 at Delainamasi Primary School.
 - (vi) The accused wife died before the complainant commenced school and she began to live with the accused when she was in class 1.
 - (vii) There is no dispute regarding the identification of the accused person in this matter.
4. The State called 2 witnesses, the child complainant, SNK and Dr. Nikhil Kumar who tendered the medical report.
5. Each of the 8 counts is a representative count, although only the first 3 counts are specifically described as such, therefore the State only has to establish that one act of sexual intercourse happened within the time period of each individual count.
6. The testimony is captured in the transcripts for this Trial – the complainant states that she started living with the Accused from when she was very young.

The evidence for the State

7. She alleges that he committed these acts on her in the year 2021 when she lived with him in Reba Circle, Nadera and she was in Class 3. The other incidents happened in 2023 when

she was living in Narere, but he would come and collect her from school in Delainamasi and commit these offences against her in his home before she left again.

8. The complainant testified that in the year 2021 she was in Year 3 and she attended Delainamasi Government School. At that time she stayed in Nadera with her grandfather, the Accused, and her aunts. Her grandfather was Navitalai and her two aunties were Kasalia and Nikeri.
9. She described her relationship with the Accused, whom she called Tutu Navi, was sometimes good and on some days it would be bad as he would give her a hiding and scold her.
10. She testified that in addition to hitting her, he would also touch her breasts and touch her buttocks, including inside her buttocks from where she would poop.
11. In addition to touching her buttock, he would also touch her mimi, the place from where she pees, he would touch the top and sometimes he would poke it inside with his finger. She would feel pain when he did this and she would scream and the Accused would always block her mouth.
12. In addition to poking his finger into her bum and her Mimi, the Accused would also put to his balls (polo) into her buttocks.
13. She was shown a human body diagram and she confirmed that the polo she was referring to was an adult male penis. She testified that Tutu Navi would do this to her many times while she was in Class 3.
14. She confirmed that when Tutu Navi did these things to her, he would take off her clothes and he did these many times when she was in Class 3. He would do this at the house in Reba Circle, in his house.
15. She never told anyone about what Tutu Navi did to her except for Anaseini, when she started living with her in 2023.

16. After she told Anaseini that Tutu Navi would touch her all over her body, Anaseini then reported the matter to the Police.
17. Under cross examination she confirmed that Tutu Navi did these things to her in 2021 when she was living there. The complainant confirmed that when she lived together with Tutu Navi, his daughters, her two aunts also stayed with them. The two aunts who were both married and were not working, and they stayed at home most of the time.
18. She confirmed that her aunt her aunts were at home in the afternoons when she returned from school. She also confirmed that when she returned from school her aunts would have something prepared for her to eat and most of the time they would look after her when she returned from school.
19. She also confirmed under cross examination that if anything had happened to her in 2021 then they could confirm that it happened. The complainant confirmed that she'd stayed with Tutu Navi from Class 1 to class 5. she also confirmed that if anything had happened the neighbors would have come to know about it as well
20. She confirmed under cross examination that each aunt had a room inside the house.
21. She also confirmed that she knows an Aunt Laisa who works at the Valelevu courthouse. She confirmed that she has known this Aunt Laisa since Class 1 and she confirms that she is a very good person. She confirms that she trusts this person and she did tell her about getting beaten up in 2021. She assisted her in calling the police however she also confirmed that she never told Aunt Laisa about what Tutu Navi did to her.
22. In 2023 she left and was staying with Anaseini her cousin. They stayed together in Makoi and there were a lot of people staying together with her at that address.

23. At that time her husband had returned from New Zealand, and they were spending Christmas and New Years together. Relatives also came from the village to spend the holidays with them and the complainant and Tutu Navi also went there.
24. After the holidays she decided to remain with her cousin and so she started living with her in Makoi.
25. She maintained that the Accused committed these acts on her and she also confirmed that she only informed her cousin Anaseini in 2023 when she came to live with her. Anaseini reported the matter to the Police.
26. The second witness for the State was Dr. Nikhil Kumar, Obstetric and Gynecologist Registrar, CWM Hospital. He stated that in 2023 he was employed at CWM Hospital.
27. He graduated from FNU with a Bachelor's Degree in Medicine and Surgery (MBBS) and he also obtained a Diploma in Obstetrics and Gynecology and is currently in his final year doing his Masters in the same field. His field of specialty is in Obstetrics and Gynecology.
28. He confirmed that on the 14th of April 2023 he was on duty at the CWM hospital in Suva and he performed a medical examination on the complainant in this matter SNK.
29. He testified that he met the complainant who was accompanied by her cousin Anaseini and a woman Police officer with a Police medical examination form.
30. He then conducted the examination and filled out the form and he then explained his findings in the form. In the brief history related by the complainant, she stated that her grandfather had penetrated her vagina with her penis and fingers. She denied being penetrated anally at any time by her grandfather.
31. His specific medical finding was that the hymen was totally disintegrated, no lacerations or active vaginal discharge, no acute tears or lacerations, anal area was normal so was the perineum. He was of the opinion that any penetration of the anus could only be visible within 6 hours of the actual incident.

32. The medical report was then tendered into evidence.
33. Under cross examination he confirmed that part of the history had been set out by Anaseini, but he had also asked questions directly to the complainant as he conducted her examination.
34. Under cross examination he confirmed that the complainant denied any penetration to her anus as well as to her mouth. He also confirmed that any injuries would have healed by the time the examination was conducted.
35. At the close of the State's case the Court made the following findings: -
- (a) Count 1 – evidence was provided
 - (b) Count 2 – no evidence provided
 - (c) Count 3 – evidence was provided
 - (d) Count 4 – no evidence provided
 - (e) Count 5 – evidence provided
 - (f) Count 6 – evidence provided
 - (g) Count 7 – no evidence provided
 - (h) Count 8 – no evidence provided
36. The Court therefore found no case to answer for Counts 2, 4, 7 and 8 therefore he is acquitted of those 4 counts.
37. He was put to his defence for the remaining counts 1, 3, 5 and 6 and he elected to give evidence.

The evidence for the Accused

38. Prior to the Accused going on the stand, there was an issue with two of the witnesses that were challenged by the State. After hearing submissions, the court found that these two witnesses would be alibi witnesses and the Accused had failed to file the alibi notice in the requisite time therefore these witnesses would not be allowed to testify.

39. The Accused denied all the allegations made against him.
40. He confirmed that he had a house in Nadera opposite the Catholic Church at Reba Circle. He lived with his two daughters, his two sons in law and his 3 grandchildren.
41. His house had 3 bedrooms, only one has a door and the two other rooms had curtains instead of doors.
42. He confirmed that his two daughters did not have jobs and stayed home most of the time. The allegations in Count 1 were put to him and he denied it. The allegations in Count 3 were put to him and he denied it. The allegations in Count 5 were put to him and he denied it. The allegations in Count 6 were also put to him and he denied the same.
43. He denied committing these acts in 2021 and also in 2023 when she was no longer staying in his home.
44. He confirmed that they had gone to spend Christmas and New Year with Anaseini and her family in Makoi, together with relatives from the village and her husband who lived in New Zealand. He would go there and drink grog and eat and then return to his home in Nadera. He stated that the complainant was living there by that time and people drank yaqona and alcohol in the same place.
45. He maintained these denials under extensive cross examination. He denied that he caused the complainant's hymen to be disintegrated by his unlawful actions. He denies all of the allegations for the remaining counts.
46. That was the evidence for the Accused.
47. The parties were then directed to file written submissions and parties have filed submissions to supplement the evidence led in Court.

The submissions for the State

48. The Accused now faces the remaining counts (1, 3, 5 and 6) for the offence of Rape contrary to section 207 (1), 2 (a), 2 (b), and 3 of the Crimes Act.

49. The State bears the burden of establishing beyond a reasonable doubt that Navitalai Komaidrakulu Kaiwai raped the complainant in the manner alleged as follows: -

- Count 1 (penetrated the complainant's vagina with his finger)
- Count 3 (penetrated the complainant's anus with his finger)
- Count 5 (penetrated the complainant's vagina with his finger.
- Count 6 (penetrated the anus of the complainant with his finger.)

50. The State relies in the main on the evidence of the complainant, a child witness. State relies on the Court of Appeal's approach to the evaluation of the evidence of a child in the case of Alfaaz vs State [2018] FJCA 19; AAU 30 of 2014 (18 March 2018.)

51. The State concedes that the complainant's evidence must be evaluated in its totality (State vs Serelevu [2018] FJCA 163; AAU 141 of 2014 (4 October 2018) and her evidence supports the remaining counts in the Information.

52. The State therefore submits that the State has discharged its burden and established the 4 remaining counts beyond a reasonable doubt.

The submissions for the Accused

53. The Accused submits that the State has failed to discharge its duty to prove the remaining counts on the Information beyond a reasonable doubt.

54. The Accused relies on the authority of State vs Solomon Qurai [2022] FJHC 275; HAC 14 of 2022 (6 June 2022) – the court needs to decide the credibility or veracity and accuracy and reliability of the evidence.

55. The Accused submits that in her evidence the complainant testified on incidents that were not part of the Information, alleging that the Accused touched her breasts and her evidence on the actual charged offences was inconsistent and not credible when looked at.
56. The complainant herself stated that when she was getting beaten by her aunt, she had confidence enough to complain to her aunt Laisa and action was taken and the Police were called. She did not tell her of these terrible things being done to her at the same time and this leads to challenges to her credibility.
57. Another issue with the evidence is the delay in reporting and lodging the complaint. The Accused submits that if she did not confide to anyone at the time these things were allegedly happening, then they did not happen at all
58. The Accused cites the case of Ganesh Goundar vs State [2015] FJCA 1; AAU 77 of 2011 (2 January 2015) where the Court discussed principles applicable when it came down to the word of the complainant and the Accused as follows: -

“[43] The learned judge directed the Assessors to find the appellant guilty or not guilty by considering whose evidence they believe. By so doing the Assessors have been misdirected with regard to the burden of proof, and thereby caused a miscarriage of justice. The Assessors may believe the evidence of Emma and disbelieve the evidence of the appellant. It does not mean that the case has been proved beyond a reasonable doubt. If, after considering the evidence of the whole case, a reasonable doubt is created in the minds of the Assessors with regard to the guilt of the appellant, the appellant is entitled to the benefit of that doubt and entitled to an acquittal. The courts have held in a series of cases that it is not correct to find the guilt of the accused by allowing the Assessors to believe either party.

[44] Brennan and Deane JJ in the Australian High Court case of Liberato and Others v The Queen [1985] HCA 66; (1985) 159 CLR 507 at 515 (minority) held, "*When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is common place for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue.*" (Emphasis added).

[45] The Court of Criminal Appeal of the Supreme Court of New South Wales in R v Li (supra) following the minority decision in Liberato, quashed the convictions and ordered a new trial on the ground of mis-directions. Dunford J held, "The issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth: They should have been directed:, the test was whether, taking into account the whole of the evidence, including what had been said by the appellant in his recorded interview, and the witnesses called in his case, they were satisfied beyond reasonable doubt of the truth of the complainant's evidence" (at 301). Hunt CJ in E (89 A Crim R 325) said, "A judge should not tell the jury that they must make a choice between the evidence led by the Crown and that given by the accused (Beserick (1993) 30 NSWLR 510 at 528; 66 A Crim R 419 at 435)."

59. The Accused submits that the State has failed to discharge its burden of establishing the remaining 4 counts in the Information therefore he should be acquitted. Those were the submissions of the Accused.

Analysis

60. After the prosecution closed its case, the Accused now only faces four counts – counts 1, 3, 5 and 6.

61. The State relies largely on the evidence of the complainant, who was 8 years old in 2021 when the initial incidents allegedly occurred and 10 years old in 2023 when the other allegations arose.

62. The law is now clear that sexual offences do not require corroboration pursuant to section 129 of the Criminal Procedure Act 2009. This is not to say that the State can dispense with other witnesses who can add context or strengthen the evidence of the main complainant.

63. The witness's evidence identified the Accused as the person who did these acts on her and with respect to the remaining counts as follows: -

- (i) Count 1 – Tutu Navi would touch mimi, only the top and sometimes he would poke it inside with his finger
- (ii) Count 3 – Tutu Navi would poke his finger into her bum
- (iii) Count 5 – Tutu Navi would poke his finger into her mimi
- (iv) Count 6 – Tutu Navi would poke his finger into her bum

64. The evidence of the doctor is of limited value as according to him any damage or injury would have healed by the time that he conducted the examination on the complainant. The complainant was adamant at the examination that Tutu Navi never penetrated her anally or orally either with his finger or penis.
65. The Court is aware that this an out of Court statement and the evidence that she led in Court would be the preferred evidence. Nevertheless it does shake the probative value of her testimony.
66. Another issue that she admitted was that her two aunts were unemployed and stayed home most of the time. Counts 5 and 6 allegedly happened in the afternoon after school and I find that there is a reasonable doubt as to whether these incidents did happen or not.
67. The same is to be said for counts 1 and 3 as 5 adults and 3 children lived in the same 3 bedroom house in a housing estate where the houses are close together. The complainant did testify that when Tutu Navi poked her, she would scream and he would block her mouth. There is no question that any such outburst would be heard in the home or next door.
68. This fact would challenge her version of events thereby raising reasonable doubts and I find that the Accused is entitled to the benefit of that doubt.

Navitalai Komaidrakulu Kaiwai this is the verdict of the Court: -

- 1. For the 1st count of Rape – you are acquitted**
- 2. For the 2nd count of Rape – you have no case to answer, you are acquitted**
- 3. For the 3rd count of Rape – you are acquitted**
- 4. For the 4th count of Rape – you have no case to answer, you are acquitted**
- 5. For the 5th count of Rape – you are acquitted**

6. For the 6th count of Rape – you are acquitted
7. For the 7th count of Rape – you have no case to answer, you are acquitted
8. For the 8th count of Sexual Assault – you have no case to answer, you are acquitted.

30 days to appeal



A handwritten signature in black ink, consisting of a large, stylized loop followed by a vertical stroke and a horizontal stroke extending to the right.

Mr. Justice U. Ratuville
Puisne Judge

cc: -Office of the Director of Public Prosecutions
-Legal Aid Commission