

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 268 of 2022

STATE

v

SETAREKI TUISAWA

Counsel: Ms. K. Semisi for the State
Mr. T. Varinava for the Accused

Date of Judgment: 21 February 2025

JUDGMENT

Caveat - The victim shall herein be referred as '**NUR**' pursuant to the name suppression Order.

1. **Setareki Tuisawa**, the accused, is indicted with three (3) counts of the offence of *Rape* laid out as follows in the Amended Information by the Director of Public Prosecutions dated 15 September 2023 and filed on 21 September 2023:

COUNT ONE

Statement of Offence

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

Particulars of Offence

SETAREKI TUISAWA on an unknown date between the 1st day of April 2020

and the 31st day of December 2020 at Navua in the Central Division, penetrated the vagina of **NUR** with his penis, without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SETAREKI TUISAWA on the 4th day of January 2021 at Navua in the Central Division, penetrated the vagina of **NUR** with his penis, without her consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

SETAREKI TUISAWA on the 25th day of June 2021 at Navua in the Central Division, penetrated the vagina of **NUR** with his penis, without her consent.

2. Setareki Tuisawa pleaded *not guilty* and tried for the aforesaid offences (21 September – 25 October 2023; Closing submission – 15 May 2024), and this is the Court’s judgment.
3. Pursuant to sections 57 and 58 of the Crimes Act 2009 including Woolmington v DPP [1935] AC 462 at 481 (HL), the prosecution bear the burden to prove *beyond reasonable doubt* all elements of the offence of *Rape* in Counts 1 – 3 in the indictment.

Physical and fault elements of Rape

4. In this instant, as per the 3 counts in the indictment, *Rape* is contrary to section 207(1) & (2)(a) of the Crimes Act 2009 which state:

Rape

207.-(1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if –

(a) the person has carnal knowledge with or of the other person without the other person's consent; ...

206.- In this Part –

(3) The term “penetrate” does not include penetrate for a medical, hygienic or law enforcement purpose only.

(4) If “carnal knowledge” is used in defining an offence, the offence, so far as regard that element of it, is complete on penetration to any extent.

Consent is defined under section 206(1) - (2) of the Crimes Act 2009 as:

206. In this Part –

(1) The term “consent” means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained –

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

5. The physical and fault elements for the offence of *Rape* in this instant are:

i) A person i.e. the accused

ii) Penetrated the complainant's vagina with his penis

iii) Without the complainant's consent [See ss. 206(1) - (2)]

iv) Intentionally and / or recklessly [i.e. *mens rea* – see Crimes Act 2009, s.23(1) - (2); For *reckless* refer to Tukainiu v State [2017] FJCA 118; AAU0086.2013 (14 September 2017) at paragraphs 31 - 34 per Prematilaka, JA.]

6. In Tukainiu v State (supra), at paragraphs 31 – 34, Prematilaka, JA held:

[31] Therefore, since section 207(2)(a) (i.e. the law creating the offence of rape) does not specify a fault element for the physical element i.e. the act of penetration without the

victim's consent (amounting to a circumstance), section 23(2) would become applicable and recklessness becomes the fault element for the physical element of rape. This is the same with section 207(2)(b) and 207(2)(c) as well, though not applicable in this case.

[32] Section 14 states inter alia that in order for a person to be found guilty of committing an offence the existence of the physical element and the required fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence but the law creating the offence may specify any other fault element as well [vide section 18(1) and (2)]. Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent); (b) lack of consent on the part of the victim; and (c) recklessness on the part of the accused as defined in section 21(1).

[33] Section 21(1) states, 'A person is reckless with respect to a circumstance of – (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.'

[34] If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4)]. Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of rape.

Admitted facts between prosecution and defence

7. The **Amended Admitted facts** between the prosecution and defence filed on 20 September 2023 pursuant to section 135 of the Criminal Procedure Act 2009 are:

- 1) The complainant is NUR, 13 - 14 year old student of Rovadrau Road, Nakaulevu, Navua.
- 2) The accused is Setareki Tuisawa, 30 year old Waiter of Davuilevu Housing.
- 3) The complainant and the accused are related.
- 4) The complainant is the accused half-sister.
- 5) The complainant lives with her parents and siblings.
- 6) The complainant is the youngest in the family and she attended form 3 at Rampur College in the year 2021.
- 7) There is no dispute as to the identification of the accused person in the matter and the complainant and the accused person are known to each other.
- 8) Between the 1st of April 2020 and 31st December 2020, the accused penetrated the vagina of complainant with his penis.
- 9) On the 4th of January 2021, the accused penetrated the vagina of the complainant with his

penis.

10) On the 25th of June 2021, the accused penetrated the vagina of the complainant with his penis.

11) The complainant and the accused lived in the same residence at the time of the alleged offending and the accused was present at the residence during this period.

8. Based on the *Amended Admitted facts* in paragraph 7 herein, the identity of the accused as being the person who penetrated the complainant's vagina with his penis is not in dispute, to the effect that the prosecution has proved *beyond reasonable doubt* the physical elements of *Rape* in Counts 1, 2 & 3 of i) a person i.e. the accused; and ii) penetrated the complainant's vagina with his penis, outlined in paragraph 5 herein.
9. The contentious issues in this trial, however, are in relation to i) whether the complainant NUR consented or otherwise to the penile penetration of her vagina by Setareki Tuisawa; and ii) the presence or otherwise of the fault element of intention to rape and / or reckless as to rape, highlighted in paragraphs 5 and 6 herein.
10. At trial, prosecution called 2 witnesses i.e. PW1: NUR (Complainant); and PW2: Josivini Maria, and tendered via PW1 the exhibit i.e. PE1 – Certified copy of PW1's Birth Certificate.
11. As for the defence, DW1: Setareki Tuisawa the accused gave sworn testimony, and did not call any other independent witness nor tendered any particular defence exhibit.

Prosecution case via PW1 and PW2

PW1 - NUR (Complainant)

12. **PW1 NUR, the complainant**, in **examination-in-chief** testified that she is 16 years old and reside at Rovadrau, Nakaulevu, Navua. PW1 stated that she was born on 25 June 2007 and tendered a certified copy of her birth certificate duly marked as 'PE1'. PW1 stated that her father's name is Suliasi Kumilevu, and that of her mother is Josifini Maria. PW1 stated that her two older brothers are (i) Abaramu Naqio (23 years) and (ii) Suliasi Viakata (18 years). PW1 stated that she has a step-sister Finiasi Musuka, and 4 step-brothers the eldest being Setareki

Tuisawa, Jitoko Turu, Isaac Bulabalavu, and Alipate Waisele. PW1 stated that her step-siblings are her father's children from before, and she does not know their real ages, but stated that Alipate and Isaac are about 25 years old. PW1 stated that her and the step-siblings have the same father but different mothers, and Setareki Tuisawa is the eldest step-sibling while PW1 is the youngest. PW1 stated that she is currently schooling as a Form 4 student at Yasawa High School situated in Naviti, Yasawa. PW1 said that she currently lives at Nakaulevu, Navua with her father, mother, two brothers namely (i) Abaramu Naqio (23 years) and (ii) Suliasi Viakata (18 years), grandfather, and two uncles. PW1 stated that her Form 4 subjects are Maths, English, Basic, Social and Home Economics, Fijian, and Commerce. PW1 stated that her hobbies are playing sports and music. PW1 stated that she started attending Yasawa High School last year in 2022 in Term 3, and lives with her grandmother Lanieta Nakoto while attending said secondary school. PW1 stated that her grandmother Lanieta Nakoto is her dad's step-mother who resides at Marou village, Naviti, Yasawa.

PW1 stated that she does recall the period **1 April 2020 to 31 December 2020**, and during that particular period she stayed at Nakaulevu, Navua with her father, mother, brothers, uncles, and grandmother or 'Tai' i.e. the I-Taukei term for grandfather used mainly by the I-Taukei from the western provinces of Viti Levu. PW1 stated that her brothers names are (i) Setareki, Suliasi, Abaramu, and Alipate; uncles names are (i) Levani Savou and (ii) Ratu Masau; and grandfather or Tai's name is Wame Savou. PW1 stated that she was schooling at Rampur Primary School in Navua and in class 8 during that time period. PW1 stated that between 1 April 2020 and 31 December 2020, her step-brother raped her. PW1 stated her step-brother was drinking that night and then he came into her room and touched and kissed her, and she told him to move away, but he continued to force himself on her. PW1 stated that he then kept on kissing her and licked her neck and breast, and she tried to push him but he continued to force himself on her. PW1 stated that she then told him that she will tell him to her mum and dad, but he did not stop and continued sucking her breast. PW1 stated that she tried pushing him away, but he continued to force himself on her. PW1 stated that she pushed him to the wall and he tried to take off her pants. PW1 stated that at that time she was wearing a t-shirt and trousers including a bra and panty. PW1 stated that when he tried to take off her pants, she tried to move him away, but he still forced himself on her. PW1 stated that she tried to push him away for him not to take off

her pants. PW1 stated that she then tried to shout or call out, but he closed her mouth by putting his hand in top of her mouth, but could not recall which hand of his it was. PW1 stated that she tried to shout or call out at that time because he tried to take off her pants. PW1 stated that she felt ashamed and did not like what he did. PW1 stated that after he had put his hand on her mouth, he then told her not to make any sound, which her feel scared of him. PW1 stated that she did not make any sound after being told by him not to make any sound. PW1 stated that she was scared of him because he will punch or do something to her. PW1 stated that he then took off her pants and started licking her vagina, and then she tried to push him away, but he did not move away and continued to lick her vagina. PW1 stated that he then took off his pants and put his penis out, and then put his penis into her vagina, upon which PW1 felt pain in her vagina. PW1 stated that she then tried to move, but he was holding onto her thighs. PW1 stated that she then tried to push him away and kick him, but he continued to put his penis into her vagina. PW1 stated that she then told him to stop, but he continued to do it, and also told him that what he is doing is painful. PW1 stated that he continued to do it until he said in I-Taukei, “*me yacova sara na gauna e cegu levu kina*”, meaning ‘when he ejaculated’. PW1 stated that she was lying down and looking at him when he put his penis into her vagina. PW1 stated that she did not consent to him putting his penis into her vagina. PW1 stated that after he ejaculated, he then stood up and wore his pants, and she was just lying down and looking at him, and it was painful what he did to her. PW1 stated that she felt pain, scared and ashamed. PW1 stated that she felt ashamed because of what he did to her. PW1 stated that he told her not to tell anyone of what he did to her, if not, he will kill or smack her. PW1 stated that she felt scared because of what he told her and did to her. PW1 stated that after he told her that, he just stood up and went out of her room. PW1 stated that she then took her trousers and clothes and started to wear her clothes, and still felt pain and scared. PW1 stated that at that time, she was at home with her two brothers, a cousin, and her grandfather. PW1 stated that she did not inform any of those present at home at that time of what Setareki had done to her because she was scared of what he told her in that he will kill or smack her.

PW1 stated that she recalls the date **4 January 2021**. PW1 stated that from 1 April 2020 to 31 December 2020 to 4 January 2021, she did not inform anyone of what Setareki had done to her because she was scared. PW1 stated that she was scared to tell her mum and dad because they

will get angry or smack her. PW1 stated that she was scared to tell her friends and relatives of what he did to her because they will talk about her and make fun of her. PW1 stated that on **4 January 2021** she and others were staying at her neighbour's house playing with water while her mum and dad were drinking grog. PW1 stated that her mum then sent her to go to their home to bring a pot so that food can be put into that pot. PW1 stated that when she went to get the pot, Seta was at home. PW1 stated that he then asked her where is their mum, and she then told him that they are at the neighbour's house drinking grog. PW1 stated that he then asked her what she came for, to which she replied that her mum sent her to fetch a pot. PW1 stated that when she entered the front door, he then closed the same door. PW1 stated that at that time, apart from Setareki and her, no one else was at home. PW1 stated that the other occupants of their home were at the neighbour's place. PW1 stated that after Setareki had closed the front door, he then pulled her into the room by pulling her hand. PW1 stated that she then told him that she was sent for an errand, but he forcefully pulled her inside the room. PW1 stated that she tried to push, but he tried to pull off her *suluvakatoga*. PW1 stated that he tried to pull her *suluvakatoga*, she then tried to push him for her to go out, but he continued to pull of her *suluvakatoga*. PW1 stated that she then told him not to do that thing because she does not like it. PW1 stated that he did not listen to what she told him, and then pushed her to the bed, forced her and took off her *suluvakatoga*. PW1 stated that when she tried to move, he told her not to move and not to make any sound. PW1 stated that he then started kissing her mouth and took off her t-shirt and bra, to which she told him not to but he spoke harshly to her. PW1 stated that he then said to her "why are you moving, I told you to keep still". PW1 stated that he then pulled her pants and panty, then began touching her vagina with his hands. PW1 stated that he then took off his pant, and he continued to hold her thighs when she tried to move. PW1 stated that he was holding her thighs tightly, and then put his penis into her vagina. PW1 stated that she tried to push him because it was painful what he was doing to her and told him accordingly. PW1 stated that when she told him of how painful it is, he held her tight and put his penis into her vagina. PW1 stated that he continued to have sex with her until he ejaculated, and then he looked up and put on his clothes. PW1 stated that she did not consent to him putting his penis into her vagina at that time. PW1 stated that she felt pain when he put his penis into her vagina, scared, and ashamed of herself when lying down at that point in time. PW1 stated that she like that because of what he did to her. PW1 stated that after he put on his clothes, he then told her

not to tell anyone of what he did to her, and that she knows what will happen to her if she did, in that, he will punch and kill her. PW1 stated that she then looked for her clothes to wear and in pain. PW1 stated that she then went out of the room, put on her clothes, and then went to look for the pot to take to her mum who was at their neighbour's house. PW1 stated that she did not inform her mother nor anyone else at her neighbour's house of what Setareki had done to her because she was scared to tell them.

PW1 stated that she can recall the day 25 June 2021. PW1 stated that between 4 January 2021 and 25 June 2021, she did not inform anybody of what Setareki had done to her because she was scared of what he told her. PW1 stated that on 25 June 2021 she turned 14. PW1 stated that on 25 June 2021, they celebrated her birthday at home in Nakaulevu, Navua, and her mum and dad were drinking grog while they had their dinner and watched TV. PW1 stated that while they were watching TV, she then went into her room to lie down and sleep. PW1 stated that while she was sleeping at about 10 o'clock, she could feel someone kissing her mouth. PW1 stated that the light in the room is always off, and the light from the kitchen shone through to the room. PW1 stated that she could feel someone kissing her and upon waking up, she saw Setareki with the light from the kitchen shining into the room. PW1 stated that she could smell beer on Setareki, and she tried to push him, but he did not move and continued to kiss her. PW1 stated that she tried to push him and call her mum and dad, but he closed her mouth with his hand. PW1 stated that he then told her not to make any sound, not to shout or call anyone. PW1 stated that he then tried to take off her t-shirt and bra as well, and started sucking her breast, and tried pulling of her pants. PW1 stated that he tried to pull off her pants and panty, and she told him not to do it, but he continued to do it. PW1 stated that he then started to touch her vagina, took off his pants, and then put his out his penis and inserted it into her vagina. PW1 stated that she felt pain and ashamed, and did not consent to him doing this to her at that time. PW1 stated that when he put his penis into her vagina, she tried to push him away, but he was holding onto her thigh. PW1 stated that she then told him, "You are not ashamed of what you are doing to me", to which he said, "I am not afraid of anything". PW1 stated that despite telling him that, he continued putting his penis into her vagina. PW1 stated that she then told him that it is painful what he is doing to her, to which he told me to keep quiet and not to make any sound nor talk. PW1 stated that he forcibly put his penis in and out of her vagina several times, and then heard

him breathing out heavily and laid on top of her. PW1 stated that she felt weak and tried to push him away from her, he then stood up and put on his clothes. PW1 stated that he told her not to tell anyone of what he did to her. PW1 stated that remained lying down and was weak. PW1 stated that all her family were at home at that point in time. PW1 stated that her father, mother, two brothers, and an uncle were all sleeping in the house at that time. PW1 stated that she did not inform any of her family member of what Setareki had done to her at that time because she was afraid of what Seta told her that he will punch or kill her. PW1 stated that she did not ask for help from any family member at that time because she was afraid of what he will do to her. PW1 stated that the last time that he did something to her was on 25 June 2021. PW1 stated that after 25 June 2021, she did not talk to him a lot, and when he talks to her, she does not talk back to him. PW1 stated that she continued to stay with Setareki at Nakaulevu, Navua after the alleged incident on 25 June 2021.

PW1 stated that she can recall the day **20 January 2022**. PW1 stated that on that particular day, they were all staying at home, and then she had a stomach ache. PW1 stated that at home were her mother, father, Seta, two brothers i.e. Abaramu and Suliasi, and a cousin-sister. PW1 stated that when they were at home, she had a stomach ache and when she touched her stomach, she could feel something was moving. PW1 stated that she was scared to tell her mother that she was pregnant. PW1 stated that she was scared to tell her mother because her mother will get angry and lecture her. PW1 stated that she could not hold the pain in her stomach and then asked her mum if she could massage her stomach. PW1 stated that her mum then massaged her stomach, and while massaging her stomach she could feel a child inside her stomach. PW1 stated that her mum then asked her whether she was pregnant, to which PW1 responded that she is not pregnant because she was scared to tell them as they would get angry and lecture her. PW1 stated that her mum then told her dad for them to take her to the hospital for a checkup. PW1 stated that her dad then called the car for them to go to the hospital. PW1 stated that they then went to the Navua hospital and upon reaching the hospital her dad brought a wheelchair. PW1 stated that she went to the Navua hospital with her mum and dad. PW1 stated that when she sat on the wheelchair, her water came out from her vagina. PW1 stated that her mum then went to a nurse for an emergency, and her dad pushed her to where the nurse was, and the nurse told her to lie down. PW1 stated that when was lying down, and when she moaned, immediately

the child came out, and the nurse took the child and told me that it is a boy. PW1 stated that they were then told that we should be taken to the Suva hospital because PW1 gave birth prematurely at 7 months. PW1 stated that her mum told her dad that she had given birth prematurely at 7 months and should be taken to the Suva hospital. PW1 stated that the nurse then brought the baby and they got into an ambulance and taken to the Suva hospital. PW1 stated that they were taken to the CWM hospital, and the doctor there took the baby to the room where premature babies are. PW1 stated that she was then taken by a nurse to the maternity ward, and she and her baby spent 3 months at CWM hospital. PW1 stated that when they got discharged from CWM hospital, her cousin-sister asked her dad if she could take care of the baby. PW1 stated that her cousin-sister took the baby to Lautoka. PW1 stated that she told parents that Seta is the father of the baby, and they got angry and ashamed. PW1 stated that she was supposed to be in Form 4 when she gave birth to the baby boy. PW1 stated that she only realized that she was pregnant when she had the stomach ache on 20 January 2020, and prior to that she did not know of her pregnancy.

PW1 stated that prior to the alleged incidents, Setareki always helped and cared for her, and PW1 would listen to him because he is older than her. PW1 stated that she always listens to what Setareki tells her, and whenever he asks for anything, she always listen or obey him. PW1 stated that she respected Setareki being her older half-brother.

PW1 stated that when she was taken to the hospital, the doctor found out that she was underage and they may have reported the matter to the police. PW1 stated that she gave a statement to the police regarding the alleged rape. PW1 stated that she is now attending school in Yasawa because she is ashamed that her friends will talk about her. PW1 stated that she had known Setareki since she was a child. Upon leave being granted for Dock ID, PW1 positively identified Setareki Tuisawa by pointing him out sitting in the accused box in High Court no. 10.

13. In **cross-examination**, PW1 stated that Setareki treated her with love, care and respect, and Setareki's biological mother lives overseas and sends clothes and chocolates to him. PW1 stated that Setareki gives her clothes or chocolates when she asks him. PW1 stated that Setareki always smack her when she does not listen to him, which she does not tell her parents about.

PW1 stated that it is a lie that the reason why she did not tell her parents about being smacked is because Setareki has never assaulted or threatened her. PW1 stated that her home in Navua has three bedrooms, one room is occupied by her and a cousin, her parents occupy a room, while the third room is occupied by Setareki and her other brothers. PW1 stated that her uncle and grandfather sleep in the sitting room. PW1 stated that she does not lie beside Setareki when he returns home from work. PW1 stated that between 1 April 2020 and 31 December 2020, she did not have sexual intercourse with Setareki in the boys' room. PW1 stated that the house was full and her family were at home when the first sexual encounter happened, and she did not scream. PW1 stated that she did not inform her cousin that she stayed in the same room with including her parents and grandfather of the sexual intercourse with Setareki.

PW1 stated that at the second incident, her mother had asked her to fetch a pot from their home, and when she took the pot over, her mother did not ask her anything. PW1 stated that she did not tell her mother, father, cousin and brother of her having sexual intercourse with Setareki that particular day. PW1 stated that she was schooling in 2020 and she did not inform her teacher nor anyone in her school of the sexual intercourse with Setareki. PW1 stated that Setareki was working in 2020 and 2021. PW1 stated that when Setareki is at work, she goes to school and when she returns home from school Setareki is still at work. PW1 stated that even at that point in time she did not inform her family of having sexual intercourse with Setareki because she was scared to tell them. PW1 stated that on 1 April 2020 to 31 December 2020 she knew the location of the Navua Police Station, but she did not lodge any report about the sexual intercourse with Setareki. PW1 stated that after 4 January 2021 she did not go and lodge a complaint at the Navua Police Station, and likewise on 25 June 2021 and thereafter, because she was scared of the police. PW1 stated that it is not correct that on 4 January 2021 that when she got home Setareki had just finished having his shower. PW1 maintained that she did not consent to having sex with Setareki in the boys room on 4 January 2021, and neither did she consent to sexual intercourse on the first incident between 1 April 2020 and 31 December 2020, and on 25 June 2021. PW1 said that it is not correct that on an occasion she had consensual sexual intercourse with Setareki inside the bathroom, and the farm in Navua. PW1 stated that it is not correct that at times when Setareki would be lying down on his bed she would then go and sit on top of him. PW1 stated that it is not correct that she and Setareki would have multiple

consensual sexual intercourse in the living room. PW1 admitted that this matter only got reported to the police after she gave birth, and that she informed her parents that Setareki was the child's father. PW1 stated that she did not inform her parents that she was raped by Setareki. PW1 admitted that the nurses had reported the matter to the police. PW1 admitted that she was embarrassed to tell the police that Setareki was the child's father because he was her half-brother. PW1 admitted that she was embarrassed to tell her friends and relatives that Setareki is the child's father. PW1 said no when told that she only complained about being raped in order to save herself and her dignity. PW1 stated that all the sexual intercourse with Setareki were not consensual.

14. In **re-examination**, PW1 stated that she did not scream during the alleged incident because he forced her not to shout or make any sound.

PW2 – Josivini Maria

15. **PW2 Josivini Maria** in **examination-in-chief** testified that she is 42 years old, married to a Suliasi Kumilevu with two children namely, (i) Suliasi Viakata (18 years); and (ii) NUR (16 years). PW2 stated that apart from these two children, she has two other children namely, (i) Abarama Naqio (22 years). PW2 stated that her husband has four children namely, (i) Setareki Tuisawa; (ii) Finiasi Musuka; (iii) Jitoko Tura; and (iv) Isaac Bulabalavu, and she does not know their respective age. PW2 stated that out of the children Setareki Tuisawa is the eldest and NUR is the youngest.

PW2 stated that on **20 January 2022** she was at home with her husband and NUR, and then NUR went to pick mangoes with her friends and returned home around 1pm to 2pm and told her and her husband that she has a stomach pain, to which her husband then told her to massage NUR's stomach. PW2 stated that when she massaged NUR's stomach she could feel the baby moving inside the stomach, then she told her husband that the baby is inside NUR's stomach. PW2 stated that her husband then told her, "No, there is no baby in her stomach", and for her to get the Fijian medicine she use to drink. PW2 stated that she then went and got the Fijian medicine and gave it to NUR to drink, and therefore NUR wanted to go and have a bath. PW2

stated that when NUR was in the bathroom she called her that there is something coming out of her. PW2 stated that when went to check, she saw a baby coming out, then she ran to her husband and told him that there is a baby. PW2 stated that her husband then saw the baby and then they called a friend's car to take them to the Navua hospital, and upon reaching the hospital her husband went and got a wheelchair. PW2 stated that NUR got onto the wheelchair and they took her to the doctor and told the doctor that NUR is having a baby. PW2 stated that they then took NUR to the maternity ward for her to give birth. PW2 stated that when NUR gave birth, the doctor then called them to go and see NUR and the baby. PW2 stated that when they went in to see the baby, her husband asked NUR as to who the father of the baby is, to which NUR replied that it is Setareki. PW2 stated that they were shocked as they could not believe what Setareki had done to NUR. PW2 stated that her husband asked NUR again, and she replied that it is Setareki. PW2 stated that NUR was crying when telling them this. PW2 stated that the doctor then said that NUR had to be taken to the CWM hospital in Suva because the baby was born 7 months premature. PW2 stated that the doctor said that only her and NUR were to go to Suva and her husband to go back to their home in Navua. PW2 stated that at CWM hospital the doctor said that only NUR and the baby can stay at the hospital and for her to return home. PW2 stated that she then returned home in the ambulance, and her husband was waiting for her, and that was at about 10pm. PW2 stated that their home is at Rovadrau, Nakaulevu in Navua. PW2 stated that when she arrived home her husband asked her about NUR and the baby to which she replied that they are fine at CWM hospital in Suva, and her husband then told her that when he reached home he called all the kids at home and told them that NUR had a baby and it is Setareki's baby. PW2 stated that Setareki was not at home that night but had seen him earlier during the day around 10am to 11am. PW2 stated that Setareki has been staying at her house for five to six years, but he did not return home after 20 January 2022. PW2 stated that Setareki's brother Isaac called and said that Setareki is in Namadi Heights with him. PW2 stated that her house has 3 rooms, a living room, and a kitchen. PW2 stated that the first room is occupied by her mother-in-law, a room for the boys, and the other room for the girls. PW2 stated that at that point in time, she lived in that house with her uncle Wame Savou, cousin Levani, niece i.e. Lavenia, two sons i.e. Abaramo and Suliasi, Setareki. PW2 stated that NUR and Lavenia sleep in the girls room, while the boys sometimes sleep in the room and living room, and her uncle and cousin sleep in the living room. PW2 stated that the doctor at CWM hospital reported the

matter to the police. Upon leave being granted for Dock ID, PW2 positively identified Setareki Tuisawa by pointing him out sitting in the accused box in High Court no. 10.

16. In **cross-examination**, PW2 stated that she only found out who the father of the child was when she asked about it. PW2 stated that before she knew about the father of the child, NUR did not tell her of what has been happening between her and Setareki.
17. PW2 was not **re-examined** by the prosecutor.
18. Having called PW1 and PW2, the prosecutor then closed the State's case, and defence given the options of the accused (i) remaining silent; (ii) giving sworn testimony; and (iii) calling other independent witness, of which the defence opted that the accused testify under oath and not call other witness.

DW 1 – Setareki Tuisawa

19. **DW1 Setareki Tuisawa** in **examination-in-chief** testified that in 2020 he resided at Navua with his father, step-mum, Josivini Maria's uncle including the uncle's son, in a three bedroom house. DW1 stated that one bedroom was occupied by their grandmother, another bedroom was occupied by the girls, and the third bedroom was occupied by the boys. DW1 stated that in 2020 he use to care a lot for NUR. DW1 stated that apart from caring for NUR, he also helped her when she needs something. DW1 stated that as the days go by when he was living at Navua, NUR saw the things that were sent to him from his mother and she also wanted the same type of treatment to be given to her, and it went to a stage that she wanted him intimately. DW1 stated that when he is in the boys room sleeping, she use to come to him in the boys bedroom wanting to sleep with him. DW1 stated that they both agreed to do it, and had sexual intercourse and slept on the same bed next to each other. DW1 stated that they he laid on top of her when they had sexual intercourse, and she was calm during the sexual intercourse. DW1 stated that she removed her clothes on her own. DW1 stated that at that time everyone was at home. DW1 stated that they had sexual intercourse in the boys room and at the plantation where she agreed to have sex. DW1 stated that on **4 January 2021** they had sexual intercourse in the boys room.

DW1 stated that on 4 January 2021 she was at a function and was asked to come home while he was in the bathroom, and when he stepped out of the bathroom, he saw that she was giving him facial reactions and signs indicating to him for them to go to the room and have sexual intercourse. DW1 stated that they then proceeded to the room, they kissed and then had sex, to which she was agreeing to having sex.

DW1 stated that on 25 June 2021 he had sexual intercourse with NUR in the boys room where they had often have sex. DW1 stated that they both agreed to having sexual intercourse on 25 June 2021.

20. In **cross-examination**, DW1 stated that he is the eldest of all the siblings and NUR is the youngest. DW1 stated that in the period 1 April 2020 to 31 December 2020, NUR was in class 8 at Rampur Primary School but did not know her age. DW1 admitted that at that period he was the adult of the two and NUR was the youngest. DW1 admitted that on 4 January 2021, NUR was still only 13 years old, and he had a wife and two children. DW1 agreed that being the eldest he was in a position of authority over NUR. DW1 admitted that on 20 January 2020 NUR was taken to the Navua hospital and she had given birth to a baby boy. DW1 admitted that the child is his because they had sex on many occasions. DW1 stated that he was at home on 20 January 2022 and then left in the course of that day because he found out that NUR had given birth that day. DW1 stated that he left home because he was scared of his father and overheard people conversing and swearing at home. DW1 stated that he left out of fear knowing that what he had done to NUR was wrong, and being scared of his father who punches him even when he is married. DW1 admitted that having sexual intercourse with NUR his half-sister is wrong. DW1 refuted that between **1 April 2020 and 31 December 2020** when he penetrated NUR's vagina with his penis, NUR had not consented to it. DW1 stated that he had been drinking alcohol that particular night but was not drunk. DW1 refuted forcing himself on NUR at that time. DW1 stated that it is a lie that he had closed NUR's mouth with his hand to prevent her from shouting. DW1 stated that it is a lie that he threatened to assault and kill NUR if she informed anybody about what he had done to her at that time.

DW1 stated that on **4 January 2021** there was nobody else at home except him and NUR. DW1

stated that it is a lie that he forcefully pulled her into the room at that time. DW1 stated that it is a lie that NUR did not consent of him penetrating her vagina with his penis, and threatening her not to tell anyone.

DW1 admitted having sex with NUR i.e. penetrating her vagina with his penis on her birthday on 25 June 2021. DW1 stated that he did not consume alcohol that night. DW1 stated that it is a lie that NUR did not consent to the sexual intercourse. DW1 admitted that at that time NUR was younger than him. DW1 stated that his aunt had done the traditional practice of seeking forgiveness from his dad and family. DW1 stated that he had sought forgiveness because it has brought a lot of shame to him and his family. DW1 stated that he thought that this would not come to light until NUR gave birth.

21. Defence counsel did not **re-examine** DW1 and then rested its case.

22. Upon the defence closing its case, both counsels then made closing submissions, and this is the Courts judgments on the three allegations of *Rape* as per the indictment.

Analysis of the entire evidence

23. The physical and fault elements for the offence of ***Rape*** in Counts 1 – 3 of the indictment are:

- i) A person i.e. the accused;
- ii) Penetrated the complainant's vagina with his penis;
- iii) Without the complainant's consent; and
- iv) And did so intentionally and / or recklessly.

24. Based on the ***Amended Admitted facts*** noted in paragraph 7 herein, the following facts are not in dispute:

- a) The identity of the accused Setareki Tuisawa, further substantiated by positive Dock ID

engaged by PW1 and PW2; and

- b) Setareki Tuisawa penetrating NUR's (complainant) vagina with his penis (i) between 1 April 2020 and 31 December 2020 as per Count 1; (ii) on 4 January 2021 as per Count 2; and (iii) on 25 June 2021 as per Count 3,

to the effect that the prosecution has proved *beyond reasonable doubt* the physical elements of *Rape* pertaining to i) a person i.e. the accused; and ii) penetrated the complainant's vagina with his penis, outlined in paragraphs 5 and 23 herein.

25. Given the admitted facts, the contentious issues in this trial are whether:

- i) The complainant NUR consented or otherwise to the penile penetration of her vagina by Setareki Tuisawa; and
- ii) Setareki Tuisawa intended to rape NUR the complainant or was he reckless as to the rape.

25. On that note, I now turn to carefully consider the entire evidence adduced at trial by both the prosecution and defence mainly through the testimonies of PW1 – NUR the complainant including PE1 – Certified copy of PW1's birth certificate; PW2 – Josivini Maria; and DW1 – Setareki Tuisawa.

26. Having carefully considered the entire evidence, I find as follows:

- a) PW1's Nur (complainant) demeanour in the course of her testifying during trial is conducive and consistent with the finding that she is a credible, reliable and truthful witness, and I attribute immense weight to her account proving *beyond reasonable doubt* that Setareki Tuisawa, her half-brother, between 1 April 2020 and 31 December 2020 (Count 1), on 4 January 2021 (Count 2), and on 25 June 2021 (Count 3), penetrated her vagina with his penis, without her consent, and Setareki intended to rape her.

- b) PW2 Josivina Maria is also a credible, reliable and truthful witness whose account does not in any manner or form contradict that of PW1, and I therefore also attach considerable weight to her evidence, also having observed her demeanour at trial to be conducive and consistent to the finding of being a credible and reliable witness.
- c) I reject the account given by DW1 Setareki Tuisawa and hold that he is not a credible and reliable witness, and the probative value or weight duly attached to his testimony is heavily outweighed by the testimonies of PW1 Nur (complainant) and PW2 Josivini Maria.
- d) Given a) – c) above, I accept the testimonies of PW1 & PW2 as being credible, reliable and truthful, and concurrently reject that of DW1.

26. For the reasons stated above, I therefore find that the prosecution has proved *beyond reasonable doubt* that **Setareki Tuisawa** is indeed guilty of the charges of Count 1: Rape; Count 2: Rape; and Count 3: Rape, in the Amended Information by the Director of Public Prosecutions, and I convict him accordingly of the aforesaid charges.

27. Thirty (30) days to appeal to the Fiji Court of Appeal.



Hon. Mr. Justice Pita Bulamainavalu
PUISNE JUDGE

At Suva

21 February 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused