

**IN THE HIGH COURT OF FIJI**

**AT LABASA**

**CRIMINAL JURISDICTION**

**Criminal Case No. HAC 67 of 2023**

**State**

**-v-**

**Navitalai Lavekau**

**Counsel: Mr. E. Kotoilakeba for the State  
Ms. K. Marama for the Accused**

**Date of Trial: 16 - 18 December 2024  
Date of Judgment: 31 January 2025**

**JUDGMENT**

1. The complainant has been granted name suppression. I refer to her as 'CC' in this Judgment.
2. Mr Navitalai Lavekau ("the accused") is charged with the following two counts:

**INFORMATION BY THE  
DIRECTOR OF PUBLIC PROSECUTIONS**

**NAVITALAI LAVEKAU** is charged with the following offences:

## **COUNT ONE**

### ***Statement of Offence***

**INDECENT ASSAULT:** Contrary to section 212(1) of the Crimes Act 2009

### ***Particulars of Offence***

**NAVITALAI LAVEKAU** sometime between the 1<sup>st</sup> of May, 2023 and the 30<sup>th</sup> of July, 2023, at Nalele settlement, Taveuni in the Northern Division, unlawfully and indecently assaulted [CC] by kissing her on her mouth.

## **COUNT TWO**

### ***Statement of Offence***

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

### ***Particulars of Offence***

**NAVITALAI LAVEKAU** sometime between the 1<sup>st</sup> of May 2023 and the 30<sup>th</sup> of July, 2023, at Nalele settlement, Taveuni in the Northern Division, penetrated the vulva of [CC] with his finger, [CC] being a child under the age of 13 years.

### **Count One – Indecent Assault**

3. To establish the offence of indecent assault, the prosecution must prove beyond reasonable doubt that:
  - (i) The accused kissed CC on her mouth; and
  - (ii) The assault was unlawful and indecent.
  
4. An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be

a hostile or aggressive act or one that causes the complainant fear or pain. 'Unlawful' means without lawful excuse. The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant's body which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.

### **Count Two - Rape**

5. To establish the offence of rape, the prosecution must prove beyond reasonable doubt that the accused penetrated CC's vulva with his finger. The slightest penetration suffices.
6. Since CC was 6 years old at the time of the alleged offending, the issue of consent does not arise.

### **The trial**

7. The trial ran for three days from 16 December to 18 December 2024.
8. The prosecution called two witnesses, CC and her mother ("CM").
9. The accused elected to give evidence, and called two witnesses, Dr Chandra and his wife, Esitela.

### **The prosecution case**

10. CC gave unsworn evidence from the child-friendly room at the Labasa Court Complex. She was accompanied in the room by a support person from Labasa Women's Crisis Centre.

11. CC said that when she was living in Nalele last year, she was playing in the flower and “Navi” called her and she said “no”. Navi called her again, and she went inside the room and asked “what”, and Navi touched her. When asked to point to where on a picture of a female child Navi had touched her, CC pointed to the genitalia.
12. When asked what else Navi did, CC replied that he kissed her, and she pointed to the left cheek on the picture, which was marked with a cross.
13. When asked what Navi touched her with, CC said “five hand”, and when asked how many times Navi had touched her CC said “five times”. When asked how she felt when Navi touched her, she said that she felt “hurt”. She said that when her mummy bathed her it hurt very much.
14. CC said that she told “Maki” what Navi did to her, and Maki told her mummy. CC then told her mummy what Navi had done.
15. When asked to demonstrate on a doll how Navi had touched her, CC demonstrated touching with a flat hand. She said that she was wearing a skirt, singlet and tights when he touched her. Navi touched her on top of her clothes “not the inside”.
16. CC said that her mum and dad were at their job in Naqara when Navi touched her. She was alone in the room with Navi when he touched her.
17. The marked picture was adduced as exhibit “PE-1”.
18. In cross-examination, CC was asked whether Navi touched her on top of her skirt and she answered “Yes”.

19. When asked to confirm that she had said in her evidence-in-chief that Navi kissed her on her cheek, and whether he kissed her only one time, CC replied “Yes”.
20. When defence counsel indicated that she had completed her cross-examination, the Court sought to clarify with her whether it was the defence case that the accused accepted CC’s evidence that he touched her between her legs, on top of her clothing, or whether it was the defence case that he did not touch CC at all. This prompted Ms. Marama to embark on further lines of questions.
21. Ms. Marama asked whether CC’s eldest brother, Bernard, a Class 5 pupil, plays a kissing game with her. CC replied “No”. When asked whether Bernard touched her, CC replied “No”.
22. When it was suggested to CC that the accused had never touched her inside the room, CC answered “*He touched*”. When it was suggested to her that the accused never kissed her, CC answered “*He kissed my lips. He kissed my cheek and my lips*”.
23. CM gave evidence about her domestic arrangements in 2023. She was living in a one bedroom house in Nalele together with her husband and their six children. Also living with them were her two sisters, Makitalena and Esitela, and her brothers-in-law, Arthur and Navitalai. Makitalena was married to Arthur, and Esitela was in a *de-facto* relationship with Navitalai.
24. CM worked long hours in her bakery, and entrusted her sisters to look after her children whilst she was working.
25. She recalled an occasion in 2023 when Makitalena and Arthur came to her bakery and informed her that something happened to CC. She and her

husband rushed home, and she called CC into the bedroom. She could see in CC's eyes that she was scared, and she held CC close and asked her to tell her everything.

26. She told CC not to be scared, and started asking her about what happened. CC was crying and told the story of what the accused did to her. CC told her that the accused touched her private area and kissed her. When she asked how he touched her private area, CC replied *"Mummy, he touched it inside and it was pain."*
27. When she asked CC why she didn't tell him to stop, or why she didn't tell mum, she said that she was scared because the accused told her not to say anything, and she had told him to stop, but he didn't.
28. When the Court asked her whether CC had told her when this touching had happened, CM stated that CC didn't really tell her the day, but she said he touched her five times.
29. When asked by the prosecutor whether CC had told her where Navi had kissed her, CM answered that *"He kissed her lips"*.
30. Immediately after CC told her what had happened, CM asked her husband to take her to the police station. She lodged a complaint, and the police accompanied her home, and recorded statements from her and CC.
31. Under cross-examination CM denied that her sisters had called her to inform her that Bernard was touching the other children's private parts, especially CC. She did accept, however, that one of her sisters had told her that Bernard was very naughty, and had been peeping at the other children when they were bathing. CM had spoken to Bernard and told him this was not

appropriate, and told him to stop. Bernard had told her that he was not peeping at the other children.

32. When it was suggested to her that her sisters had informed her that the accused had seen Bernard asking Arthur to suck his penis, CM said that stories had come to her after she had reported the matter to the police. When the Court sought to clarify this evidence, CM confirmed that at no time before she reported the matter to police had her sisters informed her that Bernard was acting in a sexually inappropriate way.
33. CM rejected Ms Marama's suggestion that the other children would lie to protect Bernard.
34. Ms Marama elicited from CM that Makitelana and Arthur had informed her that it was Arthur Junior who had told them what had happened to CC.
35. CM accepted that she did not have a good relationship with the accused, and would tell her sister that he is not right for her because he is very disrespectful. She also accepted that this case has put a strain on her relationship with Esitela.

#### **Defence submission of no case to answer**

36. At the close of the prosecution case, the defence made an application, pursuant to section 178 Criminal Procedure Act, that a case was not made out against the accused sufficiently to require him to make a defence to count two.
37. In resisting that application, the prosecution submitted that CC's evidence about the accused touching her genitalia over her clothing, and this touching causing her "*hurt*", was sufficient to put the accused to his defence. The

prosecution emphasized that they need prove only the slightest penetration of CC's vulva to support count two.

38. I ruled that there was a case to answer, and allowed a short adjournment for the accused to take advice on his election. He elected to give evidence in his own defence, and informed the Court that he would call his wife as a defence witness.

### **Defence Case**

39. The accused stated that, in 2023, he was staying at Nalale settlement together with his wife, her sisters, their husbands and their children. He and his wife and child had moved in with CM because of financial hard times, and he was given a job at CM's bakery.
40. He worked at the bakery from the beginning of 2023 for about 7 months. He quit the job because his pay was cut, and he moved to Delaivuna to farm.
41. He was working on the farm when his wife unexpectedly arrived at around 6pm. She informed him that her sisters were blaming him for sexually abusing CC.
42. The following day, he went to the police station to enquire whether a report had been made against him. He did this because he knew the truth that he didn't do it.
43. The police confirmed that a report had indeed been made. They took his statement, and held him in the cell for 3 days.
44. When asked about his relationship with his wife's family, the accused said that when they were together they showed their nice side, but when he



wasn't there they would talk behind his back. He said the relationship was not good.

45. When asked about CM's children, the accused said that their parents hardly visited them. He said Bernard used to bully his younger siblings. His wife was mainly responsible for taking care of all the children.

46. When he was at home after work, he saw the children misbehaving. On one occasion, he looked through the toilet window and saw Bernard telling Makitalena's son, Arthur, to suck his penis. He informed Makitalena, who came and beat Bernard with a sasa broom. When CM returned from work in the afternoon, they informed her about the incident, but she just laughed it off.

47. When asked whether he ever disciplined the children, the accused said that they never listened to him. They talked back to him, and even swore at him. He put this down to the fact that he was married to the youngest sister.

48. When asked to comment on CC's evidence, the accused answered:

*"Everything that she says like her mother is forcing her to say. It's not true. There's no evidence there that stated that I've done that, I didn't."*

49. The accused denied ever touching or kissing CC inappropriately.

50. The accused said that the information had come from the small boy, Arthur, who told Maki and Arthur.

51. In cross-examination the accused confirmed that people usually call him "Navi".

52. He said that the pressure of looking after all the children caused his wife to lose her unborn child.
53. When he was asked about calling CC into the bedroom, and touching her private parts, the accused answered: *“I never touch her private part, but that’s what I saw her brother doing to them and they blame me for it because I saw them.”*
54. In response to the Court inquiring whether the accused was saying that he witnessed the brother touching CC’s private parts, the accused said: *“But not the big brother. The younger brother. They were partner up like the big brother and the second. Like there are four of them. The brother partner up with the second elder sister and [CC] were partner with Arthur Junior. I saw them they were playing with each other and that time I inform my wife and that’s how the story change. They blame me. The information came from the small boy, not from Arthur and his wife. So to me Arthur – Bernard somehow tell Arthur Junior to blame me that I done that.”*
55. In answer to the Court asking what he had seen, the accused said: *“I see them like they were lying and they were covered with what you call this blanket, and they were moving inside then I move inside then I saw them. They were playing with each other. The light was off. They never saw me. Only the small one saw me, Arthur Junior, when I came back.”*
56. Before calling the accused’s wife, defence counsel informed me that she also wished to call the doctor who had examined CC. When the Court queried the purpose of calling the examining doctor, defence counsel informed me that the purpose was to confirm that when he examined CC there was no indication of pain or hurt.

57. Dr Avneel Chandra confirmed that he had examined CC at Taveuni Government Hospital on 30 July, 2023. She had just turned 6 years old at the time of the examination. Dr Chandra confirmed his medical findings that he found no obvious signs of injury on her face, neck, chest or abdomen. On examination of her genitalia, he found no discharge, no bleeding, no bruise, and the hymen was not bruised.
58. When asked by Ms Marama whether his findings were consistent with a complaint that someone had touched her genitalia, Dr Chandra said that a touch on her genitalia may not show significant injury.
59. The Medical Examination Form was adduced as “DE-1”.
60. In response to my specific question whether his medical findings were inconsistent with there having been a slight penetration of CC’s vulva, Dr Chandra answered that the slightest penetration of the vulva may not induce injuries that may be visible.
61. In re-examination Dr Chandra was asked whether there may be pain or some sort of hurt even though there is no visible injury. Unsurprisingly, Dr Chandra answered that that would depend on the individual’s pain threshold. He elaborated that pain is a very subjective clinical finding.
62. The accused’s wife, Esitela, was called as the final defence witness. She confirmed that she had been living with her eldest sister in Nalele in the period May to July, 2023.
63. Esitela said that she looked after the children. She described them as naughty, meaning that when she told them to do something they would never do it. When she talked to them, they would talk back to her. She said that

Bernard and Arthur would pull their pants down and make CC and her sister touch their penis. She saw this many times.

64. On one occasion, she caught them and informed Maki, who gave them a hiding. When Maki informed CM about this incident, she just laughed, which made Maki angry. She heard Maki tell CM not to be surprised if they do something bad, like peeping on other girls or doing something bad on another girl. This took place about three months before the allegation against her husband.
65. Esitela stated that this bad behaviour continued even after the allegation against her husband.
66. When Ms Marama asked her to explain how she came to know of the allegation against her husband, Esitela said that she was at home in the morning when Arthur informed Maki and Arthur that Navi did something on CC.
67. When the Court sought to clarify whether she was present, and what exactly Arthur said that Navi had done to CC, Esitela said she was present when Arthur said that he saw Navi and CC kissing, and he saw Navi using his hands to poke her private parts.
68. Esitela said that the relationship between her husband and CM was not good. When he is at home the relationship is good, but when he is not at home they would talk bad things about him.

### **Closing submissions**

69. I heard closing speeches on 18 December, 2024, and I have also read the defence written submissions filed on 19 December, 2024.

70. In her closing speech, Ms. Marama reminded me of CC's evidence that the accused touched her genitalia over her skirt, and demonstrated that he touched her there with five fingers. Ms. Marama argues that the prosecution has failed to prove even the slightest penetration of CC's vulva.
71. Ms. Marama also argued in closing that CC did not make a recent complaint to her mother. She developed this point in her written submissions. The gist of her argument is that CM's evidence does not fall within the recent complaint exception to the hearsay rule because the complaint originated with Arthur. Arthur told Makitalena and Arthur who, in turn, informed CM. It was only when CM asked CC what had happened that CC told her that the accused had touched her genitalia and kissed her.
72. Ms Marama argued that her client would not have voluntarily attended the police station to enquire about the allegations against him had he been guilty. Put another way, she argued that typically a person faced with a serious allegation would flee.
73. Finally, in closing, Ms Marama spelt out the defence case theory in stark terms:
- “In conclusion, My Lord, this is the defence theory. Because Navi saw Arthur Junior touching [CC] and then switched the story that the accused touched the victim. Arthur saw the accused, so Arthur then changed the story and informed his mother, Makitalena, that the accused did this to [CC].”*
74. In their written submissions, defence counsel raised further issues under two sub-headings.

75. Firstly, under the heading “*Delay in Reporting*”, the defence argues that there was no evidence led as to the offending falling within the period particularised in the Information. Related to this point, the defence point out that the matter was not reported until late July, 2023, and there was no satisfactory explanation regarding this delay.
76. Secondly, under the sub-heading “*Motive*”, the defence appears to argue that CM’s dislike of the accused provides a motive for her to have encouraged her daughter to make false allegations against him.
77. In his closing speech, Mr Kotoilakeba confidently asserted that the prosecution had successfully established all the elements of both counts. In doing so, however, he wrongly stated that CC had demonstrated on the doll that the accused had penetrated her with his fingers. Mr Kotoilakeba graciously stood corrected when I queried this after speeches.

### **Discussions with counsel**

78. After speeches, I raised with counsel whether there were any particular legal directions which they felt that I ought to give myself when I came to consider this Judgment.
79. Specifically, given the way in which the counts are particularised in the Information, I was keen to hear counsel’s views on whether I could regard what CC told her mother as a recent complaint. In a sense, this issue is related to the defence point about the prosecution not adducing any evidence to establish when the alleged offending took place. If the Court does not know when the alleged offending happened, how can it determine whether the complaint about the alleged offending was ‘recent’?

80. The prosecution maintained that it was a recent complaint, whereas the defence maintained that it was not a recent complaint for the reasons given in closing.
81. When I queried with the prosecution the absence of any clear evidence that the alleged offending occurred during the pleaded timeframe, Mr Kotoilakeba was unable to explain how the prosecution had fixed upon those dates. He very fairly accepted that the evidence went no further than that the alleged offending took place in 2023, at a time when the accused was living at CM's house.
82. Ms Marama asserted that the prosecution are required to prove that the alleged offending occurred within the specified period. When I proffered my view that, generally speaking, the date of the alleged offending is not an element that the prosecution is required to prove, Ms Marama asserted her understanding that it is an element of the offence. Mr Kotoilakeba stated that, as far as he was concerned, time is never an element of the offence.

### **Analysis**

83. The prosecution must prove that the accused is guilty. The accused does not have to prove anything to me. The defence does not have to prove that the accused is innocent. The prosecution will only succeed in proving that the accused is guilty if I have been made sure of his guilt. If, after considering all of the evidence, I am not sure that the accused is guilty, my verdict must be not guilty.
84. CC is a young child. She was around 6 years old at the time of the alleged offending, and 7 years old at trial. It is for me to decide whether she is reliable and has told the truth. The fact that she is young does not mean that

her evidence is any more or less reliable than that of an adult. I must assess her evidence in the same fair way as I assess the other evidence in the case.

85. Because CC is so young, I bear in mind a number of things. A child does not have the same degree of maturity, logic, perception or understanding as an adult. A child may find questions difficult to understand – they may not fully understand what they are being asked to describe. It may be that they do not have the words to accurately or precisely to describe things in the same way that an adult might.
86. A child may be tempted to agree with questions asked by an adult because the child sees an adult as being in a position of authority. Also, if a child feels that what they are asked to describe is bad or naughty, this may lead to them being embarrassed and reluctant to say anything about it, or to be afraid that they get into trouble.
87. A child's perception of the passage of time is likely to be very different to that of an adult. A child's memory can fade, even in a short time.
88. These things are relevant to a child's level of understanding rather than to their credibility.
89. None of these things mean that CC is or is not reliable: that is a matter for my judgment.
90. At the outset, it is helpful to identify the issues in dispute in this case.
91. It is not disputed that CC and the accused are well known to each other. Identity is not in issue.



93. The battle lines have been clearly drawn. The defence says that the allegations against the accused have been concocted, and are false. They have advanced, explicitly and implicitly, motives for these allegations to have been fabricated. I shall return to these motives below.
94. Essentially, what it boils down to in relation to count one is whether I am sure that the accused kissed CC on her mouth. In relation to count two, am I sure that the accused rubbed CC's genitalia over her clothing and, if so, am I sure that his fingers penetrated CC's vulva.
95. The prosecution case relies solely on my assessment of CC's reliability and credibility.
96. After a perfectly understandable initial reluctance to engage with the proceedings, as she no doubt found the set-up of being asked questions remotely somewhat alien, CC was able to understand the questions being asked of her, and to provide appropriate answers. I have no doubt about her competence to give unsworn evidence.
97. CC was able to tell the Court that she was in Class 2 last year (2023), and was living in Nalele with her extended family, who she named.
98. CC's account of having been playing in the "*flower*" when the accused called, and her replying "*No*", before complying with his second call, and going inside the room, has the ring of truth about it.
99. CC's demonstration of being touched on her genitalia was spontaneous, and her description of being touched with "*five hand*" is a very good example of what I said above about a young child not necessarily having the vocabulary to fully describe what had been done to her. Despite these limitations, it was

quite clear to me that she was describing her genitalia having been rubbed over her clothing. The fact that she described this as hurting is not inconsistent with her account of being rubbed over her clothing.

100. CC's evidence about being touched on top of her clothing "*not the inside*" is unambiguous.
101. CC's description of her genitalia hurting very much when being bathed by mummy does not assist me on the issue of penetration of her vulva because there is no clear timeline between the alleged touching and the bathing. Indeed, CM's evidence rules out that this bathing took place after the offending alleged in count two. Clearly, CC must have been referring to having felt pain during bathing on a different occasion unconnected to count two.
102. CC's initial evidence about the accused kissing her was that he kissed her left cheek, but when it was suggested to her in cross-examination that the accused never kissed her, she answered confidently that "*He kissed my lips. He kissed my cheek and my lips.*"
103. Turning to the complaint evidence, the full extent of CC's evidence was that "*I told mummy what Navi do.*"
104. The context in which CC told her mother what the accused did is important. It will be recalled that CM had learned of the allegation against the accused from her sister who, in turn, had been told by Arthur. CM then rushed home, and asked CC to tell her what the accused had done to her.
105. I consider the complaint evidence to be problematic for a number of reasons. I have already alluded to the first problem. Since there is no evidence as to when the alleged offending took place, the Court is placed in some difficulty

in determining whether the complaint was made at the first reasonable opportunity.

106. However, I do not consider this problem to be insurmountable given that the evidence establishes that the alleged offending took place when the accused was living with CC's family in 2023, and the complaint was made in late July, 2023. Given that CC was very young, her relationship to the accused, and her evidence that the accused told her not to say anything, it would, in my view, be open to this Court to find that the complaint was made at the first reasonable opportunity.
107. Be that as it may, my further concerns have led me to decide that the complaint evidence does not assist me in my assessment of CC's credibility.
108. The principal difficulty is that there was no evidence adduced as to what CC told her mother. There is, therefore, no basis upon which this Court can assess consistency. Whilst CM's evidence about what she was told by CC is largely consistent with CC's evidence, I note that there is at least one respect in which CM's evidence as to what CC told her is inconsistent with CC's evidence at trial. When asked what CC told her, CM answered "*She told me that Navitalai touched her private area and kissed her, and when I asked her how did he touch your private area, she said mummy he touched it inside and it was pain.*"
109. It may very well be that CC did tell her mother that the accused touched her private parts "*inside*", and caused pain, but this is not admissible evidence that the accused did touch her inside.
110. It is also possible that CC told CM that the accused touched her "*outside*", and CM misunderstood, or has a flawed memory of what CC said to her during what must have been an extremely stressful time for CM.

111. The upshot is that the complaint evidence does not assist me in assessing CC's credibility.
112. A further concern with the complaint evidence is the manner in which it came about. CM was told a version of what had happened to CC, and there is plainly a risk that what she had been told coloured her difficult conversation with her daughter.
113. It is settled that the complaint must be voluntary in the sense that it was not made as a result of leading questions. Whilst the fact that the questioner speaks first does not necessarily make the reply inadmissible, in the circumstances I have described, I cannot be sure that whatever CC did say to her mother (of which there is no evidence) was not influenced by the manner in which her mother questioned her.
114. For the sake of completeness, I should say that I do not consider there to be any merit in the defence argument that what CC told CM is not a recent complaint because CC had already complained to aunty Maliki. There is no reason to prevent more than one complaint being admitted if both were made within a reasonable time.
115. Turning then to the defence case.
116. I remind myself that if the accused's denials are, or may be, true, I must find him not guilty. Even if I reject the accused's evidence, I must not find him guilty unless the prosecution have been made me sure of his guilt.
117. The accused was quite explicit in answering the allegations. He said that:

*“Everything that she says like her mother is forcing her to say. It’s not true. There’s no evidence there that stated that I’ve done that, I didn’t.”*

118. It was implicit in his testimony that false allegations have been made against him because CM and her family disrespect and dislike him. My impression of him is that the accused has something of an inferiority complex. For example, he felt that the family spoke behind his back, and he was not listened to by the children because he was married to the youngest daughter.
119. Having said that, CM did not shy away from accepting that she did not like the accused. She considered him disrespectful and, I suspect, considered him not good enough for her little sister.
120. Having observed her closely in the witness box, my impression of CM is that she is an extremely hard-working and diligent business owner. With six children she has a lot on her plate. Perhaps too much. Be that as it may, she struck me as an honest and righteous person who cares deeply about the well-being of her children. That much is evident from her response to being told that the accused had abused her daughter. She was distressed in the witness box when recounting that experience. Certainly, she would not have put her daughter through the trauma of the trial process merely because of her disdain for the accused.
121. I, therefore, have no hesitation in rejecting out of hand the accused’s suggestion that CM put her daughter up to lying in Court about what he did to her.

122. I need hardly point out that the suggestion that CM has orchestrated the allegations is wholly inconsistent with the defence case that the complaint originated with Arthur, a four years old child.
123. The accused would have this Court believe that, in wholly unrealistic circumstances, Arthur thought that he may be in trouble because of what the accused had seen, and then had the presence of mind to “*shift the blame*” on to the accused by making a false report to his parents.
124. Plainly, the defence case theory is inherently implausible. I reject it entirely.
125. I need say no more about what the accused and his wife had to say about the naughty children, and allegations of their sexually inappropriate behaviour. That evidence has no bearing on the issues I must decide.
126. I should, however, say something about the defence leading evidence that the allegation that the accused had kissed and touched CC was first made by Arthur to his parents. I felt some unease at this evidence being introduced, given that there was no indication that Arthur would be called to give evidence. Plainly, what he said to his parents was inadmissible to prove the truth of what he apparently told his parents.
127. On reflection, however, it was necessary for the defence to introduce this evidence because it was a central plank of the defence case that Arthur had “*shifted the blame*” to the accused.
128. I approach this evidence on the basis that it is inadmissible to support that the accused committed the alleged offences, but is admissible to support that it was Arthur who first made the allegations against the accused.

129. Finally, and for the sake of completeness, I must say that I find wholly unattractive the defence submission that the fact that the accused voluntarily attended the police station supports his innocence. Just as complainants in sexual abuse cases respond differently, the same may be said of those suspected of serious sexual offending. Voluntary attendance at the police station does not, in my view, support the accused's consciousness of innocence.
130. Having rejected the defence case, I must return to the central issue of whether I accept CC as a truthful and reliable witness.
131. My starting point is that there is nothing implausible in her account of what the accused did to her. On his account, the accused would be at home with the children, and he would interact with them. It has never been suggested that the accused did not have the opportunity to commit the offences he is charged with.
132. CC gave evidence in a straightforward manner commensurate with her age. She was able to demonstrate clearly what the accused did to her. When challenged about her account, CC was firm in rejecting the defence case that what she said happened never happened.
133. I find CC to be a truthful and reliable witness. I am sure that the accused kissed her on her mouth and, on the same occasion, rubbed her genitalia over her clothing with his hand.
134. However, whilst I consider that it is entirely possible that the accused *may* have penetrated CC's vulva by rubbing her genitalia in the manner described by CC, I am not satisfied so that I am *sure* that the accused did penetrate CC's vulva.

135. Other than the act of rubbing, the only evidence relied on by the prosecution to prove penetration is CC's evidence that she felt hurt. In my view, that is insufficient to prove even the slightest penetration. As Dr Chandra confirmed, pain is highly subjective. To my mind, the act of rubbing that sensitive area of CC's body could well have caused her discomfort irrespective of whether her vulva was penetrated by the act of rubbing or not.
136. Having found that the prosecution have failed to prove that the accused penetrated CC's vulva, I must find him not guilty of rape. That, however, is not the end of the matter.
137. Pursuant to section 162(1) (f) Criminal Procedure Act 2009, where a person is charged with rape, but the court is satisfied that the evidence adduced at trial supports a conviction for a lesser sexual offence, the court may record a conviction for that lesser sexual offence.
138. As will be apparent from my reasoning above, I am satisfied so that I am sure that the accused rubbed CC's genitalia with his fingers above her clothing.
139. It follows that I satisfied that the evidence adduced at trial supports a conviction on count 2 of sexual assault, contrary to section 210(1)(a) Crimes Act 2009.
140. In my judgement, this act clearly has some element of indecency, in that any right-minded person would consider such conduct sexual and indecent in nature.
141. Likewise, the act of kissing CC on the lips has some element of indecency, in that any right-minded person would consider such conduct sexual and indecent in nature.



142. Accordingly, the Court finds you guilty and convicts you on the following counts:

Count One – Indecent Assault: contrary to section 212(1) Crimes Act 2009.

Count Two – Sexual Assault: contrary to section 210(1) (a) Crimes Act 2009.

143. You have 30 days to appeal should you so choose.



  
Hon. Mr. Justice Burney

**At Labasa**

31 January, 2025

**Solicitors**

**Office of the Director of Public Prosecutions for the State  
Office of the Legal Aid Commission for the Accused**