

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 351 of 2023

STATE

vs.

MV

Counsel: Ms. S. Bibi for the State
Ms. R. Nabainivalu with Ms. N. Pratap for Accused

Dates of Hearing: 24th and 25th March 2025
Date of Closing Submission: 11th April 2025
Date of Judgment: 19th May 2025

JUDGMENT

1. The names of the Complainant and the Accused are suppressed for the recording and publication purposes.
2. The Acting Director of Public Prosecution filed this Information on the 10th of January 2024, charging the Accused with one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act; two counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act; and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The particulars of the offences are:

COUNT 1

Statement of Offence

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

Particulars of Offence

MV on an unknown date between the 1st day of January 2018 and the 31st day of December 2018 at Nasinu in the Central Division, had carnal knowledge of MT, a child under 13 years of age, by penetrating her vagina with his penis.

COUNT 2

Statement of Offence

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

Particulars of Offence

MV on the same occasion as in Count 1, penetrated the vulva of MT a child under 13 years of age, with his tongue.

COUNT 3

Statement of Offence

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

Particulars of Offence

MV on an unknown date between the 8th day of July, 2022 and 17th day of July 2022 at Nasinu in the Central Division, penetrated the vulva of MT, a child under 13 years of age, with his fingers.

COUNT 4

Statement of Offence

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

Particulars of Offence

MV on the same occasion as in Count 3, unlawfully and indecently assaulted MT, by touching her breast.

3. Following the Accused's plea of not guilty, the matter proceeded to a hearing, which commenced on the 24th of March 2025 and concluded on the 25th of March 2025. The Prosecution presented evidence from three witnesses, including the Complainant. At the conclusion of the Prosecution's case, the Learned Counsel for the Defence made submissions pursuant to Section 231 (1) of the Criminal Procedure Act, arguing that the Prosecution had failed to present evidence to support the second and third counts of Rape as charged in the Information. The Learned Counsel for the Prosecution conceded to this application. Accordingly, the Court found that the Prosecution did not provide evidence to establish that the Accused committed the second and third counts of Rape as charged in the Information, and dismissed these two counts, acquitting the Accused of the same under Section 231 (1) of the Criminal Procedure Act. The matter then proceeded to the Defence regarding only the first count of Rape and the fourth count of Sexual Assault.
4. The Accused provided evidence for the Defence. Subsequently, the Court heard the closing submissions from the Learned Counsel for the Prosecution and the Defence. Additionally, the Learned Counsel for both parties submitted their written submissions. Considering the evidence presented during the hearing and the respective oral and written submissions of the parties, I now pronounce the judgment on this matter.

Burden and Standard of Proof

5. The Accused is presumed innocent until proven guilty. The burden of proof for the charge against the Accused lies with the Prosecution. This presumption exists because the Accused is innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt." The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

Elements of the Offences

6. The main elements of the offence of Rape as charged are:
 - i) The Accused
 - ii) Penetrated the vagina of the Complainant with his penis
 - iii) The Complainant was a child under 13 years of age.
7. The main elements of the offence of Sexual Assault are:
 - i) The Accused,
 - ii) Indecently and Unlawfully,
 - iii) Assaulted the Complainant by touching her vagina.
8. The first element is the identity of the Accused. The Prosecution must prove beyond a reasonable doubt that the Accused committed these offences against the Complainant. There is no dispute regarding the identification; the Accused and the Complainant are known to each other.
9. Evidence of even the slightest penetration of the Complainant's vagina by the Accused's penis is sufficient to prove the element of penetration regarding the first count.

Admitted Facts

10. The Accused tendered the following admitted facts under Section 135 of the Criminal Procedure Act.

Background:

1. *MV (hereinafter referred to as the Accused) was born on the 10th of January 1987.*
2. *MT (hereinafter referred to as the Complainant) was born on the 13th of April 2010 and a copy of her Birth Certificate is tendered by consent as a Prosecution Exhibit (See TAB 14 of disclosures).*
3. *The Accused and the Complainant are known to one another. He has been in a de-facto relationship with the Complainant's mother for the past 10 years.*
4. *The Complainant's biological parents are:*
 - (i) *Ratu Jonetani Tavadroka*
 - (ii) *Narieta Vakasilima.*

2018:

5. *The Complainant was in class 2 and attended Davuilevu Methodist School.*
6. *Narieta Vakasilima, her children and the Accused lived in a small house behind her father's home in Sasawira in Nakasi.*
7. *The house did not have separate rooms.*

2022:

8. *The Complainant was in class 6 and attended Davuilevu Methodist School.*
9. *The Complainant lived with the Accused and her biological mother and other siblings at their new home in Sasawira, Nakasi which was approximately 9 houses away from her grandfather's house.*
10. *This house also did not have separate rooms.*

2023:

11. *The Complainant's mother was working for FMF.*
12. *On the 6th of November 2023 she worked the afternoon shift between 2.30 – 10.30pm.*
13. *The Accused was not employed.*
14. *The Accused was at home with the children and was drinking beer outside their home that Monday evening (6th November)*
15. *The Accused was arrested on the 17th of November 2023 and was interviewed under caution by PC 6090 Filipe Tukanavakarua on the same day.*
16. *WDC 6013 Adivodo took photographs of the alleged scene of crime on the 9th of November 2023 and compiled the said photographs into a photographic booklet. The same is tendered by consent.*

Prosecution's Case

11. The Complainant was eight years old in 2018 and lived with her mother, the Accused (her stepfather), and her siblings in a small house behind her mother's father's house in Sasawira, Nakasi. One night, between the 1st of January 2018 and the 31st of December 2018, she woke up from her sleep to feel someone on top of her. She was sleeping on the floor in the corner of her grandfather's house, which had no rooms. Her younger siblings were sleeping beside her. When woke up, she noticed that the Accused was lying on top of her and put his penis on the entrance of her vagina.
12. She discovered that her clothes, including her undergarments, had been removed. She clearly saw the Accused from the light that was lit in the house. She tried to push him away, but he overpowered her and forced himself on her. He put his penis on the entrance of her vagina and he did it for about five to six minutes. He then moved away and went to sleep.
13. The Complainant testified that the Accused threatened her, stating that if she told anyone about the incident, he would harm her and her mother. Furthermore, she was reluctant to inform anyone, fearing they would spread rumours in the village.

14. The second incident occurred in 2022, when she was in sixth grade. Once again, the Accused approached her while she was sleeping on the floor with her siblings. He lay down beside her and started to touch her breasts with his hand. He put his hands through her clothes and started to touch her breast. She then got up and walked out of the house.
15. The Complainant eventually shared this matter with one of her school friends and then with her class teacher, who assured her that it had been reported to the Police. The Complainant explained the strained and volatile relationship she had with the Accused, her stepfather. Moreover, the Complainant testified that her mother was not home on either of those two occasions.

Defence's Case

16. The Accused, in his evidence, vehemently denied these allegations, stating that he had never done such a thing to the Complainant. He further asserted that more people were staying in the house with his family in 2018. Hence, it was impossible for him to sexually attack the Complainant as claimed.

Evaluation of Evidence

17. Appraising the evidence presented by the Prosecution and Defence, I shall now proceed to evaluate the evidence alongside the applicable law. To do this, the Court must first examine the credibility and veracity of the evidence given by the witnesses and then consider its reliability and accuracy. In this process, the Court should review factors such as promptness or spontaneity, probability or improbability, consistency or inconsistency, contradictions or omissions, interestedness or disinterestedness, bias, demeanour and deportment in Court, and any corroborative evidence where it is relevant. (**vide; *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022).**

18. I first focus on the evidence presented by the Defence. The Accused is not required to give evidence and does not have to prove his innocence, as this is presumed by law. However, in this case, the Accused chose to give evidence. Therefore, the evidence provided by the Defence must be considered when determining the facts of this case.

19. Lord Reading CJ in Abramovitch (1914) 84 L.J.K.B 397 held that:

"If an explanation has been given by the Accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the Accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the Accused. The onus of proof is never shifted in these cases; it always remains on the Prosecution."

20. If the Court believes the evidence presented by the Accused is true or may be true, then it must find the Accused not guilty of the offences. Even if the Court rejects the Accused's version, this does not automatically imply that the Prosecution has established the Accused's guilt in the crime. The Prosecution must demonstrate that it has proven, based on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed these offences as charged in the Information. (**vide; Naidu v State [2022] FJCA 166; AAU0158.2016 (24 November 2022), Liberato and Others v The Queen ((1985) 159 CLR 507 at 515), Abramovitch (1914) 84 L.J.K.B 397**)

21. Comprehending the preceding legal principles and the precedence on the onus of the Prosecution in proving the case beyond a reasonable doubt, I now evaluate the evidence presented by the parties to determine the testimonial trustworthiness of the evidence. As I outlined earlier, the Court must consider two aspects in determining the testimonial trustworthiness of the evidence, i.e the credibility of the witness's testimony and the reliability of the evidence.

22. The Complainant was eight years old in 2018 and is now fifteen. The evidence provided by the child witness must be evaluated by considering factors relevant to her strengths and weaknesses regarding age, mental development, understanding, and ability to communicate. (*vide*; **Nalawa v State [2021] FJCA 188; AAU014.2016** (25 June 2021)).

Probability/Possibility

23. I first focus on assessing whether the account of the event provided by the Complainant is probable or possible. Probability and possibility are key components in evaluating evidence in criminal matters. Probability denotes the likelihood of an event occurring, while possibility refers to whether an event could have happened, even though it is considered unlikely.
24. The Accused, during cross-examination, stated that in 2018, not only his family but also some other people were staying with them. Their house had no rooms; hence, this suggests that the claim of the Complainant was improbable and impossible.
25. According to the admitted facts, the Complainant and her family lived in a small house behind her grandfather's residence. In her testimony, the Complainant stated that the incident in 2018 occurred while she was sleeping at her grandfather's house. She then mentioned that after the incident, she got up and walked out of the house, heading to her grandfather's house, which is located three houses away from where the incident took place. According to the admitted facts, her grandfather's house was situated behind her small house. Unfortunately, the Prosecution did not provide further clarification regarding the grandfather's house, to which she went after the incident.
26. Notwithstanding the above perplexity, the Complainant specifically stated that she was sleeping at her grandfather's house, which does not have any rooms. She was asleep on the mattress near the corner window. The Accused made no specific claim, stating that the people who were staying with them were at the grandfather's house. He merely said they

stayed with us in 2018. Hence, I find that the Accused's claim of more people staying with them in 2018 has not affected the credibility and reliability of the Complainant's testimony.

Penetration

27. I shall now turn my attention to the issue of penetration. Premathilaka JA, in **Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) para 13-15**, meticulously defined the meaning of the vaginal area and how to approach the evidence of a child regarding the matter of penetration. Premathilaka JA held that:

“Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the

particulars of the offence state that the Appellant had penetrated the vagina with his finger. The Complainant stated in evidence that he 'poked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape. Therefore, in the light of Medical Examination Form and the Complainant's statement available in advance, the Prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the Complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence."

28. The Complainant expressly stated that the Accused put his penis on the entrance of her vagina and she felt pain at the entrance of her vagina. He then forced her when she tried to push him away. He kept doing that for about five to six minutes.
29. The Complainant was an eight-year-old minor at the time this incident occurred. There is no doubt that she was referring to the vaginal area of her body when she explained that he put his penis on the entrance of her vagina. Accordingly, I am satisfied that the Complainant explained in her evidence that the Accused penetrated her vagina with his penis.

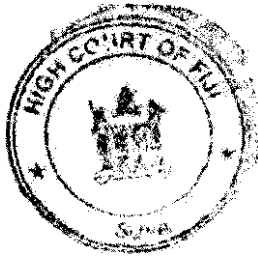
Delay

30. One of the central planks of the Defence's submission challenging the credibility and reliability of the Prosecution's case is based on the allegation of a delay in reporting this matter, suggesting that this considerable delay undermines the credibility and reliability of the Complainant's evidence.
31. I shall now proceed to determine whether the delay in reporting this matter affected the credibility and reliability of the Complainant's evidence. Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014 (the 4th of October 2018)** has extensively discussed the issue of delay in reporting, where His Lordship found that "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution's case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
32. The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution's case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence, if there is an unsatisfactory explanation for the delay or an unexplained delay. (**vide; Masei v State [2022] FJCA 10; AAU131.2017 (3 March 2022)**)
33. The Complainant explained that the Accused threatened her, stating that he would harm her and her mother if she disclosed the incident to anyone. According to the Complainant's testimony, her relationship with the Accused was strained. She also expressed concern about the stories others might fabricate if she revealed these incidents. Considering these explanations, I find that the delay in reporting the matter has not diminished the credibility and reliability of the Complainant's evidence.

Recent Complaint Evidence

34. The Prosecution presented the evidence of the Complainant's friend, to whom she confided this incident at school, and the class teacher, to whom she eventually reported in 2023. The reporting of the incident to these two witnesses did not occur immediately after the two alleged incidents; however, they could still be considered witnesses of the recent complaint. The Complainant initially told her friend that her stepfather was abusing her, and they then informed the teacher of the same thing.
35. Gates CJ in **Raj v State [2014] FJSC 12; CAV0003.2014 (the 20th of August 2014)** defined the evidence of a recent complaint, outlining its scope and application. Accordingly, the evidence of the recent complaint is not evidence of the facts complained of, but rather evidence that relates to the issue of consistency or inconsistency of the evidence given by the Complainant. Hence, the evidence of the recent complaint could enhance the credibility and reliability of the evidence presented by the Complainant. The evidence of the recent complaint does not establish the facts of which the Complainant testified or disprove those facts. It only establishes the consistency of the Complainant, establishing that she has stated a similar version of events she alleges in her evidence to the recent complaint witness. The Complainant is not required to disclose the details of the offence, covering all the ingredients. It is sufficient to explain the material and the relevant alleged sexual conduct allegedly committed by the perpetrator.
36. The Complainant informed her friend and the teacher that her stepfather had been harassing her. She had not explicitly disclosed the nature of the alleged harassment; however, I do not find this affects the credibility and reliability of her evidence.
37. Considering the reasons outlined, I find the evidence of the Complainant to be credible and reliable; therefore, I accept it as the truth. With that finding, I conclude that the evidence of the Accused is not true and fails to create any reasonable doubt in the Prosecution's case. Consequently, I find that the Prosecution proved the Accused committed these two offences as charged in the Information, as count one and count four, beyond a reasonable doubt.

38. In conclusion, I hold that the Accused is guilty of one count of Rape, contrary to Section 207 (1) (2(a) and (3) of the Crimes Act, and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act, and convict the Accused of the same accordingly.



A handwritten signature in black ink, consisting of stylized, flowing letters.

.....
Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

19th May 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.