

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 191 of 2023

STATE

V

SAINIVALATI TUBUNA

Counsel	:	Mr. L. Baleilevuka for the State.
	:	Mr. F. Singh and Ms. S. Pillay for the Accused.
Dates of Hearing	:	04, 05, 06 February, 2025
Closing Speeches	:	11 February, 2025
Date of Judgment	:	12 February, 2025

JUDGMENT

(The names of both the complainants are suppressed they will be referred to as "E.N" and "S.L" respectively)

1. The Director of Public Prosecutions charged the accused by filing the following information dated 12th March, 2024:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SAINIVALATI TUBUNA, on the 12th day of November, 2023, at Ra in the Western Division, unlawfully and indecently assaulted “E.N”, by massaging squeezing her breast.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SAINIVALATI TUBUNA, on the 12th day of November, 2023, at Ra in the Western Division, unlawfully and indecently assaulted “E.N”, by massaging sucking her breast.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

SAINIVALATI TUBUNA, on the 12th day of November, 2023, at Ra in the Western Division, penetrated the anus of “E.N”, a child under the age of 13 years, with his finger.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

SAINIVALATI TUBUNA, on the 12th day of November, 2023 at Ra in the Western Division, unlawfully and indecently assaulted “S.L” by massaging her thighs.

FIFTH COUNT

Statement of Offence

THEFT: Contrary to section 291 (1) of the Crimes Act 2009.

Particulars of Offence

SAINIVALATI TUBUNA, on the 12th day of November, 2023, at Ra in the Western Division, dishonestly appropriated 1x A13 Samsung Phone, the property of “S.L”, with the intention of permanently depriving “S.L” of the said property.

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

BURDEN OF PROOF AND STANDARD OF PROOF

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

4. There are two complainants in this case and the accused is charged with more than one offence, the evidence in respect of each complainant and each offence will be considered separately from the other. If the accused is guilty of one offence, it does not mean that he is guilty of the others as well. This also applies with the findings of not guilty.

ELEMENTS OF THE OFFENCE

SEXUAL ASSAULT

5. To prove count one the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the first complainant “E.N” by massaging, squeezing her breast.
6. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed this offence.
7. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
8. The final element of assault is the unlawful use of force on the first complainant by the accused in massaging, squeezing the breast of the first complainant.

In this regard this court has to consider:

- (a) whether the force used in massaging, squeezing the breast of the first complainant in the context of what the accused was doing to the complainant sexual in nature; and
 - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
- 9. In this trial, the accused has denied committing the offence of sexual assault as alleged. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the first complainant by massaging, squeezing her breast.
- 10. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offences of sexual assault as explained above, then this court must find the accused guilty. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then this court must find the accused not guilty.

RAPE

- 11. To prove count three the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the anus of the complainant "E.N" with his finger;
 - (c) The complainant was below the age of 13 years.

12. The slightest of penetration of the complainant's anus by the accused's finger is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case, the complainant was 10 years at the time of the alleged offending and therefore the consent of the complainant is not an issue in regards to this count.
13. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
14. The second element is the act of penetration of the complainant's anus by the finger.
15. The final element of the offence is the age of the complainant. It is not in dispute that the complainant was 10 years of age during the period of the allegation which establishes that she was below the age of 13 years at the time of the alleged incident.
16. In this trial, the accused denied committing the offence of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the anus of the complainant with his finger as alleged.
17. The slightest of penetration of the complainant's anus by the accused finger is sufficient to satisfy the act of penetration.
18. This court must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for this court to find the accused guilty. If on the other hand, this court has a reasonable doubt with regard to any of those elements concerning the offence, then this court must find the accused not guilty.

INDECENT ASSAULT

19. To prove the lesser offence of indecent assault in count four the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the second complainant by massaging her thighs.
20. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence.
21. The words “unlawfully” and “indecently” in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
22. Assault is the unlawful use of force on the complainant by massaging her thighs.
23. The accused has denied committing this offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant by massaging her thighs.
24. If this court is satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then this court must find the accused guilty. However, if there is a reasonable doubt with

respect to any elements of the offence of indecent assault then this court must find the accused not guilty.

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

ADMITTED FACTS

26. In this trial, the prosecution and the defence have agreed to certain facts titled as agreed facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
27. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

28. The first complainant informed the court that on Friday 10th November, 2023, she went to Nalidi Village for a “*soli*” function. At Nalidi the complainant and her family stayed at her uncle’s house.

29. On the night of the 11th, the complainant, after drinking juice with her siblings, went to sleep with her sister Tulia and Miriama. The house of the complainant's uncle had one bedroom, a sitting room (open space) with a bed, and no curtains in the windows.
30. The complainant was sleeping beside the bed on the floor in the sitting room with Miriama immediately next to her and Tulia. While sleeping, the complainant felt someone touching her breasts over her clothes, and the same hand moved inside her singlet and continued touching her breasts. After this, the complainant was carried and placed under the bed with her body partially outside. According to the complainant, the height of the bed was quite high above the floor.
31. After removing the complainant's skirt and trousers, this person pulled the complainant's panties sideways and started poking her anus. The complainant started to cry and she could feel the finger in her anus. At this time, Miriama switched on the light, the perpetrator said, "*this girl is crying, what happened?*"
32. Thereafter, this man stood up and left the house, the complainant was taken to her grandmother's house by Tulia, Meli and Pana. The complainant did not tell anything to her grandmother, but she told her mother. The complainant told her mother what had happened the previous night. The complainant also stated that the house had solar light, however, she was not able to see the face of the perpetrator since no light was on inside the house at the time.
33. In cross examination, the complainant stated that she was sleeping with Tulia and Miriama beside the bed, while the others were a bit away from them but in the same room. The complainant agreed there were 13 of them

in the sitting room and there was a lot of noise in the house. The complainant agreed that she knew when the accused had entered, he went and lay on the bed after removing his shirt.

34. Upon further questioning the complainant agreed that when the perpetrator came beside her on the floor she had turned. The complainant does not know whether the perpetrator had rolled off the bed.
35. The complainant does not know that after lying on the bed for 5 to 10 minutes the perpetrator had stood up and called out, but agreed that the perpetrator had called out to Amini and said, *“it’s too noisy here, I am leaving”* and then left the house. The complainant maintained that whatever she told the court had happened.
36. The complainant agreed, she did not inform anyone or shout to alert anyone about what the accused was doing to her. However, when she was carried by the perpetrator she cried. When questioned how she knew she was being touched if she was sleeping, the complainant said she felt the hand but thought it was a bottle so she did not wake up and kept sleeping. In respect of being carried whilst sleeping the complainant said she felt being lifted but she did not know by whom. The complainant again maintained that what she told the court had happened.
37. In re-examination, the complainant stated that she did not know when the perpetrator had entered the house and she was also not aware of the perpetrator taking off his shirt and lying on the bed. Upon further questioning, the complainant agreed that after 5 to 10 minutes of the perpetrator lying on the bed he called Amini and said, *“Amini it’s too noisy here I am leaving.”*

38. The complainant did not know when the accused left the house. She did not alert the other children in the house about what the accused had done because she was sleeping. According to the complainant she realized it was not a bottle but a hand when she was carried to another side.
39. The second witness Miriama Qolikoro informed the court that on Friday 10th November, 2023, she arrived at Nalidi Village with her parents and siblings to attend a “soli” function. The witness was staying at her uncle’s house. On Saturday night (11th) the witness and other children including the complainant drank juice in the house of her uncle before sleeping.
40. The complainant slept beside the bed followed by Solomoni then the witness followed by Tulia, Nasoni and Tomasi. The house did not have electricity, however, a battery operated Toshiba torchlight was being used inside the house. According to the witness at about 1 am all the children went to sleep except her.
41. When the witness was lying down she heard knocking on the door when she opened the door she saw the accused. The witness was able to see the accused from the light that was coming from the nearby shed. At this time the complainant and the others in the house were sleeping.
42. The accused went and lay beside the complainant, but in a different direction, by this time it was about 1.30 am. The witness was lying beside the complainant after sometime the witness felt that someone was moving beside her. When she woke up she saw the accused pushing the complainant away so that he could get closer to her.
43. The witness was certain that it was the accused since he had just come into the house and there was a smell of alcohol on him. The witness stood

up and went to lie beside Tomasi, so now Tulia was sleeping beside the complainant. According to the witness the complainant was now lying in another direction after the accused moved the complainant towards their head.

44. The witness woke up Tomasi and asked for his phone to use the torchlight to see what the accused was doing. When the torchlight was shone on the accused, the witness saw the accused's hand inside the complainant's clothes, like touching her breast. According to the witness, at this time the complainant was sleeping. The accused shouted at the witness to switch off the light, but the witness did not and kept shining the light on the accused face.
45. Upon further questioning, the witness stated that when she had shone the light on the accused she saw the accused was holding the complainant on his lap and slowly putting her down. The witness stated that she had clearly seen the accused and she had also moved the torch closer to him.
46. The witness also stated that the accused called Tulia to check on the complainant that something had happened to her. Thereafter, the accused stood up and left the house. At this time, the complainant was crying. The witness took the complainant to her grandmother's house and told the grandmother that the accused had massaged the complainant's breast and harassed her.
47. Apart from telling the complainant's grandmother the witness after breakfast told the complainant's mother. The witness pointed to the accused in court.

48. In cross examination, the witness disagreed that there were solar lights in the house. The witness stated that the house had a Toshiba torchlight. The witness denied that the accused had entered the house and said for someone to switch off the light so that he can go to sleep. The witness maintained that the accused had laid on the floor.
49. The witness denied the accused had laid on the bed for 5 to 10 minutes and then left the house. The accused had not called out to Amini even though Amini was present in the house. The witness clarified that the accused was pushing the complainant away from her to lie in a vertical position.
50. Furthermore, the witness was able to see the accused pushing the complainant from the light beside the house. The witness stated that what she told the court had happened. The reason why she had woken Tomasi was because he was the only one who had a phone. When the witness shone the phone's torchlight on the accused, he had looked up. The accused was bending over the complainant and his hand was inside the complainant's clothes when she shone the torchlight on the accused.
51. In re-examination, the witness stated that there was another house nearby from which the light was coming and the house they were in did not have any window louvers.
52. The third witness mother of the complainant Taina Tinai informed the court that the complainant was born on 21st June, 2013 the birth certificate of the complainant was marked and tendered as prosecution exhibit no. 1.

53. On 12th November, 2023, the witness was at Nalidi Village, having travelled on Friday 10th with her husband and five children, which included the complainant. There was a “soli” function in the village which they all went to attend. On Saturday 11th, the children of the witness were accommodated at the house of her cousin brother Inoke Turaga.
54. At about 6 am on the 12th, the witness was at her brother Dau’s house when Miriama, accompanied by the complainant, came and told the witness that the accused had come into the house they were sleeping. According to Miriama, the accused, whilst lying down, had moved towards her, but she moved away. After this, the accused moved towards the complainant, and he was massaging her breast and touching inside her panties.
55. The complainant started to cry, the light was turned on. Then the accused told them to check if anything had happened to the complainant. When the witness asked the complainant if what she had been told was true, the complainant started to cry.
56. In cross examination, the witness said Miriama had told her the accused was lying on the bed and then he fell off the bed. When questioned whether the complainant had told her anything, the witness stated that the complainant had also told her what had happened. The complainant first cried and then relayed the story.
57. The witness stated that the house did not have solar lights. On the 11th, at around 10 pm she had gone to check on the children. Inside the house, there was a Toshiba torchlight and light from the nearby houses.

58. In re-examination, the witness was asked what the complainant had specifically told her. The witness said the complainant had told her that when the accused had moved closer, he started massaging her breast, then turned the complainant around and started poking her anus.

RECENT COMPLAINT DIRECTION

59. Complainants of sexual offences may react in different ways to what they may have gone through. Some, in distress or anger, may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
60. A late complaint does not necessarily signify a false complaint, and on the other hand, an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that on 12th November, 2023, the complainant told her mother that when the accused had moved closer, he started massaging her breast and then turned the complainant around and started poking her anus. According to Taina, the complainant was crying and then relayed the above information to her.
61. This is commonly known as recent complaint evidence. The evidence given by Taina Tinai is not evidence of what actually happened between the first complainant and the accused since Taina was not present and she did not see what had happened.

62. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant was in a vulnerable and helpless situation, however, she was able to tell her mother relevant and important information about what the accused had done to her.
63. The prosecution is asking this court to consider the fact that the complainant was only 10 years of age when the accused unexpectedly abused her. The prosecution is also relying on the distressed situation of the complainant, hence the complainant's inability to give all the details of the accused's abuse to Taina shows that the complainant is likely to be truthful.
64. On the other hand, the defence says the complainant made up a false allegation against the accused. She gave a version of events to Taina which does not make sense and a totally different version in court. The defence also states that this court should consider that there are different versions, which shows the complainant was not consistent, hence she was making up a story against the accused and therefore she should not be believed.
65. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is for this court to decide whether the complainant is reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
66. The second complainant "S.L' informed the court that on 12th November, 2023, she was in Nalidi Village where she resides after marriage in a three

bedroom house. At about 4 am on that day, the complainant woke up because she felt cold on her thighs, she felt a hand touching her legs coming up to her thighs. At this time, the complainant saw the accused leave her bedroom. When asked again where the accused was when she woke up, the complainant said the accused was standing at the bedroom door. When asked how long she had observed the accused, the complainant said, *“when I woke up, he just stood up and walk out.”*

67. The complainant saw the accused from the light that was coming from the living room. The accused then left the bedroom and went to the porch. The complainant saw this when she went and stood at the bedroom door, and again she was able to clearly see the accused. The witness knows the accused well since he is her husband's first cousin.
68. When the accused was touching her legs and thighs her husband was sleeping next to her. The complainant woke her husband and told him that the accused came into the bedroom.
69. Shortly after, the complainant heard someone spitting beside her house. The complainant and her husband looked outside through the window to see. The complainant saw the accused walking across her house and going away.
70. The complainant and her husband followed the accused and saw him standing at Joveci's house. The complainant and her husband confronted the accused. The accused denied going into the complainant's house.
71. When it was brought to the complainant's attention that she had said when she woke up, she saw the accused standing at the bedroom door and later told the court she saw the accused get up and walk out, the

complainant said, *“we were lying down on the floor, and when I woke up, he stood up and went out.”*

72. In cross examination, the complainant stated that her bedroom door was about 1 ½ meters away from the porch. She further explained that from the porch one can go straight to her bedroom door. According to the complainant, there was a solar light hanging on the window in the porch and from the light in the porch, one can clearly see people moving.
73. The complainant agreed that she had identified the accused when she saw him through the light of the living room. When asked whether the accused was facing her or the living room, the complainant said the accused stood up and turned to go towards the door, and she also saw the accused when he left the porch. When it was suggested to the complainant that she did not see the accused’s face because the light was at the back of the accused head, the complainant said when the accused went to the porch, from the light in the porch, she clearly saw the face of the accused.
74. When it was again suggested that although the light was shining on the face of the accused, she had only seen the back of his head, the complainant said that she knows the accused and was able to know him as soon as she saw him. The complainant disputed the suggestion that she saw the accused in front of her porch because he was walking past her house towards Inoke’s house. The complainant stated that she clearly saw the accused leaving her porch and then going to the back of the house.
75. In re-examination the complainant pointed to the accused in court.
76. The final witness Tuilevuka Malimali informed the court that on 11th November, 2023, there was a “soli” function at his village from 11am. On

Friday 10th, his sister, brother in law and their children and his three cousins came to stay at his house. At about 9pm on the 11th, the witness left the function and went home. He was joined by his wife “S.L” for dinner, and both went to sleep at 9.30pm.

77. According to the witness, his cousins slept in the two bedrooms, whereas his sister, brother in law, their children, and his children they all slept in the living room.
78. After 4 am in the morning of 12th, the witness was woken up by his wife, who told him the accused had come inside their bedroom, switched off the phone, and touched her. When the witness asked his wife where the accused was she told him he had gone outside to the back of the house.
79. The witness heard footsteps. When he looked out the window, he saw the accused and called out “oe”. There was light coming from the shed and also from the neighbours. The witness knows the accused since they are cousins. The witness and his wife followed the accused and saw him standing at Joveci’s house, pushing the door of that house. The witness called the accused, who came. He asked the accused, “*did you come home*” the accused denied. When the witness asked the accused if he knew the lady with him, the accused said, “*that’s my sister.*”
80. When the witness came home, he saw a shirt in front of his bedroom. He recognized it to be of the accused’s because that was the same shirt he had seen worn by the accused at the “soli” function. When the witness was talking to the accused that morning in front of Joveci’s house, the accused was not wearing a shirt, but only a vest. The witness identified the accused in court.

81. In cross examination, the witness stated that the lights in the living room was on and there was a solar light hanging on the porch when everyone went to sleep. The witness agreed if the living room light is on, the light came into his bedroom and that the light was bright. When questioned how the light would be coming into his bedroom, the witness explained, *“my bedroom before was a porch, which I had converted into a bedroom with a 4 column by 10 louvers, and that is where the light was coming from, with the curtains open at night”*. Apart from this, the light in the bedroom was coming from the shed about 20 meters away from his home and the lights from his neighbour’s house.
82. The witness did not agree that he had met the accused in front of Joveci’s house around 12 am. The witness denied the suggestion that he had found the accused’s shirt at Inoke’s house after it was left there by the accused. The witness replied he did not go to Inoke’s house.
83. In re-examination the witness said the lights in the shed were flood light.
84. This was the prosecution case.

DEFENCE CASE

85. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider his evidence and give such weight as is appropriate.
86. The accused informed the court that on 11th November, 2023, he arrived at Nalidi Village for a function. After the function ended, he went to drink

liquor and drank two cans of Atlas drink. After this, the accused went to Inoke's house, pushed open the door, and entered.

87. There were children in the house, so the accused called for someone to turn on the light. According to the accused, when he was outside, he could hear the children talking inside the house.
88. When the light was switched on, the accused went to bed and lay down, but before lying down he removed his shirt and placed his phone on the bed beside him. The accused further stated that all the children were playing around and moving, he was able to recognize Amini and Filipe.
89. After lying for about 5 to 10 minutes the accused told Amini that he was going to sleep at Tamaisai's house since there was a lot of noise in the house. The accused left without his shirt and phone and went to Tamaisai's house where he slept. On the 12th, the next day, the accused met Tuilevuka Malimali in front of Joveci's house with "S.L". Tuilevuka asked the accused why he had been to Tuilevuka's house. The accused said he did not, thereafter, he went and slept at Tamaisai's house.
90. In cross examination, the accused agreed that he went to bed in Inoke's house because he wanted to sleep. The reason he asked for the light to be turned on was because he did not want to step on one of the children who were sleeping inside the house. When questioned why did he leave his shirt and phone at Inoke's house the accused said he had forgotten them there.
91. The accused denied he had forgotten his shirt and phone at Inoke's house because he had left in a hurry. When it was put to the accused that after he left Inoke's house he met Tuilevuka in front of Joveci's house trying to open the house, the accused said this was a lie.

92. The accused denied that he had knocked on Inoke's door, which was opened by Miriama. The accused denied that from in front of Joveci's house, he did not go to Tamaisai's house but had gone to Inoke's house, where he had pushed the door open and entered. The accused denied he had left Inoke's house because the first complainant started crying after he had put his hand underneath her singlet and touched her breast. The accused also denied he had poked the first complainant's anus, causing her pain and making her cry. The accused denied that he had also touched the second complainant's thighs.
93. The accused maintained that he did not do anything to the first complainant as alleged. Furthermore, the accused also maintained that he did not go into the bedroom of the second complainant and therefore he had not touched her thighs as alleged.
94. Finally, the accused stated that both the complainants had a reason to make these allegations against him because they are related to him and they have problems. The accused stated, *"we are related and there is a problem, we have relationships and we have problems"*.
95. This was the defence case.

ANALYSIS

96. The prosecution states that the first complainant (10 years of age at the time), the second complainant and the accused were at the Nalidi Village on the night of 11th November, 2023, for a "soli" function. In respect of the allegations raised by the first complainant the prosecution submits that the complainant was sleeping on the floor beside the bed in the house of her uncle Inoke Turaga with Miriama, Tulia and her other cousins.

97. At about 1am on the 12th while the complainant was sleeping on the floor beside the bed, the accused knocked on the door of the house. Miriama was the only child awake allowed the accused into the house. The accused went to sleep on the floor near the complainant.
98. The complainant felt that someone was touching her breasts over her clothes and then moved the same inside her singlet touching her breasts. After this, the complainant was carried and placed under the bed. The height of the bed was quite high above the floor. The complainant was placed under the bed in such a way that partially her body was underneath and the other half outside.
99. After removing the complainant's skirt and trousers her panties were pulled sideways and her anus was poked. The complainant started to cry because she could feel a finger in her anus.
100. The accused stood up and left the house, the complainant told her mother about what the accused had done the same day.
101. In respect of the second complainant the prosecution submits that after leaving Inoke's house the accused went into the house of this complainant. At about 4 am the complainant woke up when she felt cold on her thighs she saw the accused stand up and walk out of her bedroom and went to the porch of the house. The complainant was able to clearly see the accused. The complainant knows the accused well since he is her husband's first cousin.
102. The complainant woke her husband Tuilevuka and told him that the accused came into the bedroom. The complainant and her husband looked

outside the window and saw the accused walking across the house and going away.

103. The complainant and Tuilevuka followed the accused and saw him standing at Joveci's house. The complainant and her husband confronted the accused. When the complainant and her husband came home Tuilevuka saw the shirt of the accused at the bedroom door.
104. The prosecution submits that there was no mistake made by the second complainant in recognizing the accused. Both were known to each other and the surroundings during the recognition was well lit. The prosecution is also asking this court to consider the fact that the shirt of the accused found at the bedroom door shows the accused was at the complainant's house. Both matters were reported to the police the same day.
105. On the other hand, the defence says the allegations are a made up story. The accused went to Inoke's house where the first complainant and other children were sleeping. After removing his shirt and placing his phone on the bed, the accused lay down on the bed to sleep.
106. The accused could not sleep because the children were very noisy. After about 5 to 10 minutes the accused called out to Amini who was in the house and told him that he was going to sleep at Tamaisai's house since there was a lot of noise in the house. The defence is also asking this court to consider the fact that the mother of the first complainant in her evidence had stated that the complainant was crying and not saying anything, but in re-examination Taina stated that her daughter had told her what had happened which is highly suspicious. From the evidence of Taina, it was only Miriama who was talking and not the first complainant.

107. The defence is asking this court not to believe Miriama because she has overstated what really happened. Her version of events does not make sense and therefore she should not be believed.
108. The defence further submits that the accused never went to the house of the second complainant that early morning. It is correct that the accused met Tuilevuka and the second complainant in front of Joveci's house but that was at 12 am when he was going to Tamaisai's house. Thereafter, the accused left to sleep at Tamaisai's house. In respect of the shirt found at the bedroom door of the second complainant the defence says the shirt was forgotten by the accused at Inoke's house and was taken by Tuilevuka to his house. The defence is asking this court not to give any weight to the identification of the accused as it is unreliable because the second complainant, in her haste, made a mistake. The person in question was someone else and not the accused.
109. Finally, the defence submits that what both the complainants told the court does not make sense and is riddled with doubt. The defence is asking this court not to believe both the complainants who were untruthful.

DETERMINATION

110. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
111. In this case, there are two different versions, one given by the prosecution and the other by the defence. This court must consider all the evidence

adduced to decide whether the prosecution has proven beyond reasonable doubt that the accused committed the offences alleged. It is not for this court to decide who is acceptable between the complainants and the accused.

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

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

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

114. Furthermore, during cross examination the accused stated that both complainants had a reason to make these allegations against him because

they are related to him and they have problems. There was no attempt made to elicit more information about those problems that might have motivated the complainants to falsely implicate the accused.

115. Although it is clear to me that the defence is of denial, however, as a matter of caution I have directed my mind to the *Jovanovic* direction to remind myself that an accused has no burden to prove a motive or reason for a complainant to lie.
116. The Court of Appeal in *Rokocika v The State* [2023] FJCA 251; AU0040.2019 (29 November 2023) from paragraphs 32 to 34 made a pertinent observation in respect of the above as follows:

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

“It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about’.

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

‘If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521–

522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: *Jovanovic v R* at 523.

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

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

TURNBULL DIRECTIONS IN RESPECT OF THE SECOND COMPLAINANT

117. Although this is a case of recognition as opposed to identification the defence has taken the position that the second complainant made a mistake in thinking that it was the accused who was in the bedroom of the complainant and had touched her thighs for someone else so she had identified the wrong person in court.
118. The defence contention is that the case against the accused in some respect depends on the correctness of the identification of the accused by the second complainant which the defence alleges to be mistaken. I have therefore taken special care on the evidence of identification because it is possible that an honest witness can make a mistaken identification. An apparently convincing witness can be mistaken and so can a number of

such witnesses. I wish to also remind myself that mistakes in recognition, even of close friends and relatives, are sometimes made.

119. I have carefully looked at the following circumstances in which the second complainant had identified the accused in her bedroom:

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

The second complainant and the accused are known to each other because the accused is the cousin brother of her husband. The complainant did not say for how long the accused was under her observation but she did say that she was able to see the accused firstly from the living room light. Secondly, when the accused was in the porch through her bedroom window having left her bedroom and finally, in front of Joveci's house within a short time and distance.

b) At what distance?

According to the complainant the accused was touching her legs coming up to her thighs. This suggests the accused was in close proximity of the complainant.

c) In what light?

According to the complainant there was bright light from the living room. The solar light was hanging in the porch and immediately after she followed the accused to the house of Joveci. The complainant mentioned that the lights were bright enough to recognize the accused.

(d) Did anything interfere with that observation?

The complainant did not say there was any obstruction or interference.

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

The accused is the brother in law of the complainant and she knows him from a long time.

120. I must remind myself of the following specific weaknesses which appeared in the identification/recognition evidence of the complainant. She did not say for how long she had the accused under observation.
121. I have given the above directions as a matter of caution after the defence counsel raised the issue of identification of the accused in the bedroom by the second complainant.
122. Based on the above guidelines I would like to state that the second complainant did not make a mistake in recognizing the accused. The complainant knows the accused from a long time by virtue of her marriage to Tuilevuka.
123. In view of the above, this court accepts that it was the accused who was seen by the second complainant in her bedroom and there was no mistake made by the complainant in the recognition of the accused.
124. This court has also taken into account the observations made by the Court of Appeal in *Rokocika v The State (supra)* regarding what the accused told the court at paragraph 45 as follows:

The Liberato direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused's account (second aspect): Park v R [2023] NSWCCA 71 at [102]–[103].

125. After carefully considering the evidence adduced by the prosecution and the defence, I believe the evidence of the first complainant only in respect of the first count of sexual assault to be truthful and reliable. I accept that she gave an honest and correct account that someone had done put a hand inside her singlet and touched her breast.
126. The above version of the first complainant was supported by the eye witness Miriama who was in the same room as the complainant. Miriama was a credible witness, she gave a reliable and comprehensive account of what the accused was doing to the first complainant when she had shone the phone torchlight on the accused. Miriama was able to withstand cross examination and she was not discredited in her narration of events.
127. In respect of the charge of rape, Miriama never said anything about the complainant being lifted and carried under the bed. Once the phone torch light was shone on the accused Miriama saw that the accused's hand was still under the first complainant's singlet and most likely touching the breast of the complainant. Upon seeing Miriama the accused stopped what he was doing and left the house.
128. It is to be noted that the inconsistency between the evidence of the complainant and Miriama in respect of the charge of rape is significant which affects the evidence of the first complainant that there was penetration of her anus. I have kept in mind the comments made by the Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.20 (2 October 2015) and *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) that discrepancies, deficiencies, drawbacks and other infirmities which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance. Here the inconsistency in the evidence of the first complainant and the eye witness Miriama goes to the root of the allegation of rape raised

by the complainant. I reject the complainant's evidence that the accused had removed her skirt and trousers and pulled the complainant's panties sideways, and started poking her anus as unbelievable and an impossibility.

129. Taina the mother of the complainant in her evidence in chief said the complainant did not tell her anything about what the accused had done to her. However, in her re-examination Taina said the complainant had told her the accused had poked her anus. Taina also told the court that it was Miriama who was doing the talking whilst the complainant was crying. On the totality of the evidence I do not accept that the complainant had correctly told her mother the accused had turned her over and poked her anus as a credible account of what had happened.
130. I have no doubt in my mind that Miriama told the truth in court. She was an independent witness who told the court what she had observed with the phone torchlight she had with her. This witness was able to express herself clearly and was able to recall what had happened without any fear or favour for anyone.
131. When rejecting the evidence of the first complainant in respect of the count of rape I have taken into account that experience has shown that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress, and some do not. The fact that the complainant did not shout or yell or immediately tell anyone was due to the sudden and unexpected happening whilst soundly asleep.
132. The age of the complainant at the time was also an important consideration in this regard. The conduct of the accused and the wrong

assumption by the complainant that it was a bottle in place of a hand has no doubt contributed to the complainant's ignorance and slow reaction.

133. However, the above factors do not make the complainant a credible witness in respect of her allegation that the accused had poked the anus of the complainant. Miriama, did not tell the court that there was any poking of the complainant's anus by the accused, which is accepted by this court as an honest account of what had happened.
134. In respect of the second complainant, I accept that it was the accused who was in her bedroom that early morning. I also accept that it was the shirt of the accused, which was found by Tuilevuka at the door of the complainant's bedroom.
135. However, I am not convinced on the totality of this complainant's evidence that there was touching of her legs and thighs. The complainant gave three contradictory versions of what had happened in her bedroom that early morning. Firstly, she said when she woke up she saw the accused leaving the bedroom door. Secondly, she told the court when she woke up she saw the accused standing at the bedroom door. Thirdly, when she woke up the accused stood up and walked out. The inconsistencies mentioned above and the lack of information from where the accused had stood up are significant, which adversely affects the credibility of the complainant.
136. In my considered judgment, the outcome of such evidence creates a doubt in the prosecution's case. Although the state counsel was able to get a clarification during the latter part of evidence taking, whereby the complainant preferred the third version, it does not advance the prosecution's case any further. The complainant said she woke after she felt something cold on her thighs, like a hand touching her legs and coming

up to her thighs, but this does not mean that the accused had touched her, given the different versions of where the accused was when she opened her eyes.

137. There can be many reasons for that coldness on the thighs. For the court to be convinced beyond reasonable doubt, the evidence of the second complainant is shaky in my considered judgment, the complainant appeared to have assumed the touching of her legs and thighs was a result of the coldness she felt on her thighs. Even though the accused had stood up and walked out after the complainant woke up, it does not mean the coldness on her thighs was due to the accused touching them. There is no evidence of what the complainant was wearing (since in her evidence she does not say she had to wear her clothes before leaving her bedroom), the position of her clothes after the touching and in what position she was sleeping.
138. Another interesting aspect is that the complainant did not say that she had told her husband that the accused had touched her. However, Tuilevuka very confidently said that he was told by the complainant that the accused had touched her. This is odd. Moreover, Tuilevuka told the court that the complainant woke him up and, when he asked what happened, the complainant stated that the accused had switched off Tuilevuka's phone and started touching her. This is unusual. This is a significant contradiction. If I accept Tuilevuka's version, then the complainant must have seen what the accused was doing. According to Tuilevuka's evidence the touching of the complainant's thigh was after the accused had switched off the phone. In this respect the complainant's evidence is very different to what Tuilevuka told the court.

139. For the above reasons, I am unable to accept the evidence of the second complainant that the accused had unlawfully and indecently touched her thighs.
140. The issue of motivation raised by the accused in his cross examination does not affect the prosecution's case since none of the complainants were cross examined about this aspect.

LESSER OFFENCE

141. In respect of count one sexual assault, I have once again carefully examined the evidence in respect of this count as charged and I am satisfied beyond reasonable doubt that the touching of the first complainant's breast from under her singlet in the circumstances it occurred was sexual in nature.
142. In view of the above, the offence of sexual assault is satisfied in accordance with the evidence presented, and therefore there is no reason why the offence ought to be reduced to indecent assault.
143. Before moving any further, I have noted that the particulars of offence in count one and count four state "*massaging squeezing her breast*" and "*massaging her thighs*". The evidence is of touching the breast and thighs. In my considered judgment, there is no prejudice caused to the accused by the difference of terminology used in the particulars of offence and the evidence. The accused was represented by counsel, and the prosecution witnesses were cross examined on the defence of denial. The charges were correctly drafted in compliance with section 210 (1) (a) of the Crimes Act.

144. On the other hand, the accused did not tell the truth. He gave a version of events that is not believable. He told the court that he removed his shirt and was lying on the bed but could not sleep because the children were noisy, whereas the evidence indicates that the children were sleeping and there was no noise at all. The accused also did not tell the truth when he told the court that he left the house to go and sleep at the house of Tamaisai, when he was seen standing in front of Joveci's house trying to open the door.
145. Moving on, I reject the defence of denial by the accused in respect of the offence of sexual assault as not plausible on the totality of the evidence. The defence assertion that the accused had not done anything to the first complainant is unworthy of belief.
146. I do not believe the accused when he said that he did not do anything to the first complainant and that the allegation is a fabricated story against him.
147. The accused entered the house of Inoke where the first complainant was sleeping with full knowledge of the children inside the house. He asked that the light be turned on so that he does not step on the sleeping children. Miriama told the truth and saw the accused put his hand inside the singlet of the first complainant. The accused tried to divert the attention away from his wrong doing when he knew he was seen by Miriama, by asking why the complainant was crying and what had happened to her.
148. The defence has not succeeded in creating a reasonable doubt in the prosecution's case in respect of count one sexual assault.

CONCLUSION

149. This court is satisfied beyond reasonable doubt that the accused on the 12th day of November, 2023, had unlawfully and indecently assaulted the complainant “E.N” by touching her breast. This court is also satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse in what he did to the complainant. The act of the accused has some elements of indecency that any right minded person would consider such conduct sexual in nature.

150. In view of the above, I find the accused guilty of count one sexual assault as charged and he is convicted accordingly. Due to lack of evidence the accused is acquitted of count two sexual assault, count three rape, lesser offence of indecent assault in count four and count five theft.

151. This is the judgment of the court.


Sunil Sharma
Judge



At Lautoka

12 February, 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.