



**IN THE SUPREME COURT OF NAURU  
AT YAREN  
[CRIMINAL JURISDICTION]**

**Criminal Case No. 16 of 2024**

**BETWEEN:** THE REPUBLIC

**PROSECUTION**

JOJI GUCAKE

**ACCUSED**

**BEFORE:** Keteca J

**Date of Hearing:** 17<sup>th</sup> March – 16<sup>th</sup> April 2025

**Closing Submissions:** 18<sup>th</sup> June 2025

**Date of Judgment:** 18<sup>th</sup> July 2025

**Catchwords:** Indecent Acts in Relation to a Child under 16 years old: Contrary to Section 117 (1) (a) (b) (c) Crimes Act 2016

**Appearances:**

Counsel for the Prosecution: **S. Shah**

Counsel for the Accused: **V. Clodumar**

**JUDGMENT**

**BACKGROUND**

1. The accused is charged with two counts of indecent acts in relation to a child, contrary to Section 117(1)(a) (b) (c) of the Crimes Act 2016.
2. For Count 1, it is alleged that between 01<sup>st</sup> - 13<sup>th</sup> August 2024, he intentionally touched the complainant by licking her neck, the touching was indecent, the accused was reckless about that fact, and that the complainant is a child under 16 years old.
3. For Count 2, between the same dates, it is alleged that the accused intentionally touched the complainant by kissing her neck, the touching was indecent, the accused was reckless about that fact and that the complainant is a child under 16 years old.

4. The prosecution called the following witnesses:

- i. PW1- - the complainant;
- ii. PW2- Voliti Vakacegu Seruvatu;
- iii. PW3 Const Darg Dagego;
- iv. PW4- Livai Saukuru Sovau

5. The Defence called the following witnesses:

- i. DW1-Joji Gucake
- ii. Ignatius Sharko Bill;
- iii. Susana Loloma.

## PROSECUTION CASE

6. The complainant testified as follows:

- She arrived in Nauru with her stepfather and sister last year. Her biological father, Voliti Seruvatu lives in Australia. She speaks to him almost daily. She was born on 08<sup>th</sup> October 2008. Her relationship with the accused is not good. They don't communicate a lot. Her mother teaches at Nauru Primary School. She attended Nauru Secondary School. She has her own room at their house. The second room is vacant and the third is occupied by her parents and youngest sister who is 3 years old. When their parents fought, her father occupied the empty room. Her mother married the accused in 2021.
- Between 01<sup>st</sup> -13<sup>th</sup> August 2024, having returned from school, she was alone in her room. It was after 4pm. The accused knocked on her door. She opened it. The accused asked if he could hug her.
- Ques- How did you feel?
- Ans- It was weird. I didn't want to hug him. Out of respect I hugged him. He started to kiss my neck. I pushed him away. He kept on trying to hug me. **He kissed my neck and started licking my neck.** He lifted me around my thighs, wrapping his arms around them. Lifted me off the floor. He carried me in front of the mirror and told me to look at myself in the mirror. I was scared and felt disgusted.
- The accused pointed at her mattress and told her lie down there with him. She said - No. She told him to get out of her room. He did.
- Her Mom was not at home. She had gone to get a rental car. Her mother returned 30 minutes after her encounter with accused in her room.
- Ques- What did you say to your Mom?
- Ans- I didn't say anything. I was in my room. She told me to pack up the dirty clothes for us to take to Menen Hotel.
- Ques- Did you tell your Mom about what happened?
- Ans- Yes, after few weeks.
- Ques- When you told your Mom, what did she say?
- Ans- I told her before she went for a Fijian community meeting at Aiwo. She was shocked and angry. She couldn't wait for my father to get home.
- Ques- Were you there when the accused returned home before the meeting?
- Ans- Yes, my Mom and my sister.

- Ques- What happened?
- Ans- My Mom asked him to sit down. She started to confront him. I was there too.
- Ques- What did the accused say?
- Ans- He said- all lies and it didn't happen.
- Ques- What happened next?
- Ans- They argued. My mother told me to go with her to the meeting.
- Ques- It has happened before?
- Ans- Yes
- Ques- Before, where?
- Ans- In Fiji.
- Ques- What did you say when the accused said all lies?
- Ans- I said- it's the truth, it happened.
- Ques- Did you tell your biological father?
- Ans- Yes. I told him around September of what happened in Fiji and Nauru. He was angry and wanted to speak to Mom. The witness then identified the accused.
- Ques- He wrapped his hands around your thighs?
- Ans- yes.

**In cross-examination she said:**

- She was at home with the accused and three-year-old sister on that afternoon. She told the accused that her Mom had gone to get a rental car.
- Ques- He was happy, lifted you and kissed your cheek?
- Ans- **He kissed my neck.**
- Ques- He put you down and went to his room?
- Ans- No
- Ques- He lifted and kissed his daughter (3-year-old) too?
- Ans- My stepsister was not there.
- Ques- Your Mom would have returned by 5.30pm?
- Ans- Yes
- Ques- Your step-father does most of the washing?
- Ans- Yes, with my mother.
- Ques- **Is it a practice in your family that if there's a happy occasion, the accused would embrace you and kiss you on the cheek?**
- Ans- **Yes. On my forehead not on the cheek.**
- She was angry with the accused because he reported her to her Mom that she had a phone. She did not tell her mother about her phone because the accused asked her not to.
- Ques- More than 30 days, then you told your father?
- Ans- Yes, and continued to live in the same house as the accused.
- Ques- You told your Mom you were uncomfortable with the accused embracing you (hugging and kissing) because of your age?
- Ans- Yes. My mother told the accused this as we sat in the living room.

**On Re- Examination she said:**

- Ques- Why did it take you 30 days to tell your father?
- Ans- I was scared as Mom had given him a last warning.

**Questions from the Court**

- What did your Mom ask the accused in Fijian?
- Translates to:
- Ques- Is it true you gave a can of beer to the complainant to drink?
- Ques- Is it true, when the complainant is sleeping, you peep through her windows?
- Ques- Is it true that you entered her room and kissed her neck?
- Ans to all the Ques- No, I did not do that.

**7. PW2 Voliti Vakacegu Seruvatu testified as follows:**

- He has been residing in Sydney, Australia for 10 years. Married with 4 daughters. The complainant, is his second daughter with Susana Loloma whom he married on 05<sup>th</sup> Nov 2005. He divorced her in March 2015. He supports his children by doing monthly shopping for them. He's very close to his daughters. On 20<sup>th</sup> September 24, the complainant confided in him. She had told her mother too of what happened. He called his former wife who said that the complainant had told her of the allegations. His former wife said that she gave a verbal last warning to the accused.
- The complainant told him that the accused entered her room. He asked to hug her. In the course of that, the accused kissed her neck. The accused carried her and stood in front of a mirror.
- He got in touch with a Livai Sovau of the Children and Welfare department and shared his concerns regarding his daughter, the complainant.

**On Cross- examination he said:**

- The complainant told her mother of what the accused did on 14<sup>th</sup> August and she relayed the same to her father on 20<sup>th</sup> September 24.

**8. PW3- Constable Darg Dagego was the investigating officer. Inspector Sereima recorded the complainant's statement. He went to the accused's house. He explained the allegations to him. He explained his right to remain silent. He arrested the accused and took him to the police station. He did the record of interview (ROI) of the accused. He charged the accused and applied for him to be remanded.**

9. **PW4 Livai Saukuru Sovau** works for the Department of Women & Social Welfare- advisor to Minister of Women and Acting Director Child Protection. He's been serving in Nauru since 2014. In September 2024, he received a text message from a teacher seeking advice on how to report a matter of alleged sexual harassment. His team looked at possible support system for the complainant. He received a letter from PW2 on the allegations of the complainant and the fact that her mother said that she'll handle the matter. Considered and executed bringing the complainant to the safe house- a house for victims of domestic violence, child victims of sexual assault and neglect. He lodged a criminal complaint with Nauru Police on 17<sup>th</sup> October 24. The complainant's mother, Susana Loloma had entered the compound of the safe house and started screaming at the complainant. Susana Loloma was told to leave. The complainant was kept at the safe house for close to a month. In their assessment, the most reasonable option was for her to be with her biological father in Melbourne. The District Court granted orders that her passport be released and for her to fly and meet her father in Fiji. Interim custody/ guardianship was granted to the biological father, PW2. The complainant was escorted to Fiji by child protection officer Josie-Ann Bill and Inspector Sereima.

10. **Under cross examination-** The complainant had told her mother about the allegations and she did nothing. The complaint from PW2 also involved allegations against the accused regarding her older sister in Fiji. They did not speak to the complainant's mother before she was brought to the safe house as her mother was a person of interest. They spoke to the complainant's mother when she was brought to the safe house. He reported the alleged crime as after following the processes under the Child Protection & Welfare Act 2016, as the Acting Director under the Act.

**Ques-** The family should have been providing support to the complainant?

**Ans-** Ascertained that the complainant would on some occasions be looking after her younger sister whilst the accused and her mother would be on drinking binges. There was also domestic violence at home with the accused being the perpetrator against the complainant's mother- Susana Loloma. The reason they took the complainant, there was no family support for her in Nauru- it was non- existent.

**Ques-** Mother written off?

**Ans-** No. Based on the assessments of the of Child Protection Officers- it's never about the mother but the best interest of the child. Information obtained included social habits of the complainant's mother. She could have interfered with the complainant.

**Ques-** Has the mother been charged?

**Ans-** Not yet.

**Ques-** From your experience, you agree that the mother will be the best one to assess if a child is harassed/ abused in a household?

**Ans-** For sexual harassment cases, for a child to come forward, it's usually because of some trauma to the mother- leads to *'coercive control.'* i.e- a person who has power over someone else usually wields it in a manner that is emotional, psychological, financial, even physical. My experience- some form of *'coercive control'* by the perpetrator- usually the men in the relationship. In general, not the mother. Reports usually come independently. When mothers report, we provide the support because of *'coercive control.'*

**Ques-** Maybe mother didn't do anything because nothing happened?

**Ans-** I can't answer that.

**On his conversation with the complainant's mother-** the mother said that she knew of the allegations. She asked for time as they were supposed to fly out in November to Fiji. When the police officers went to see Susana about the complainant being taken to the safe house- she said- 'He (biological father PW2) should have just waited.

## **DEFENCE CASE**

11. The accused opted to give sworn evidence. He testified as follows;

- The accused came to Nauru in May 2024. He lived in Buada District with his wife and two daughters. Their home did not have a washing machine. It had no beds and they slept on mattresses on the floor. He worked as a customs officer at a local supermarket. He usually hand washed their clothes.
- Ques- The complainant said that the incident took place when your wife went to hire a rental vehicle. You recall that?
- Ans- A Friday.
- Ques- Did you work on that day?
- Ans- Yes. I got home at 5.45pm.
- Ques- Who was at home?
- Ans- The complainant and her sister. He and his youngest daughter went to the complainant's room. The door was open. He stood at the door. His young daughter went inside the room. He asked- 'Where's Mom? The complainant replied that she's gone to get a rental car. 'Rental car for what? She replied- "To take our dirty clothes to Menen for washing.'
- 'I was very happy. I know that I will not do hand-washing on that weekend.'
- 'With the happy feeling, I hugged her and kissed her cheeks and forehead.'
- 'I lifted her up in respectful manner and put her down again. I turn to (younger daughter) – she was jumping. I kissed her cheeks and forehead- she was happy.'
- He told the complainant to get her dirty clothes ready and he the younger daughter got their clothes ready too.
- 'I lifted her respectfully so she won't think I'm doing something to harm her.' Picked her up on her knees.
- Ques- 'Hugging and kissing happens in your family?'
- Ans- 'On some occasions- Yes. To congratulate and well wishes for exams, scoring high marks and winning oratory contests.' I've done this on many occasions to all of them.' In Nauru, I've done this on many occasions with the complainant and her sister.'
- 'My youngest daughter was right there beside me when I lifted the complainant and kissed her cheeks.'
- Ques- 'After putting the complainant down?'
- Ans- 'I did the same to my younger daughter.'
- His wife arrived about 4 minutes later and told them to get their laundry baskets and put them in the rental car. They took their washing to Menen.
- Ques- The complainant says that that her younger sister was not there?

- Ans- Not correct.
- Ques- You licked her neck?
- Ans- Not true.
- Ques- You lifted her around her thighs?
- Ans- Disagree.
- Ques- You lifted her to a mirror and asked her to look at herself on the mirror?
- Ans- Not true.
- Ques- You went, lay down on a mattress and invited her to lie down next to you?
- Ans- Not true.
- Ques- All these allegations against you, not true?
- Ans- Exactly- Not true?
- Ques- On 13<sup>th</sup> August when the complainant informed her mother of the incident, it was because she spoke to her about her phone?
- Ans- Yes. Complainant has a phone. Her biological father bought it for her and told her not to give it to her mother. His wife did not have a phone. Complainant told her mother that her phone was broken. Wife thought the phone was not broken as complainant was always in her room. His wife told him to go outside and check through her window whether she's using her phone. He looked through the window. He saw the light from the phone screen. He informed his wife that the phone was not broken. His wife called her and asked her as to why she was lying about her phone. The complainant said that her biological father told her not to give the phone to her mother.
- Ques- The complainant said that it was you who told her to hide her phone from her mother?
- Ans- Yes, I did because the complainant had already told me that her father told her not to give it to her mother. I told the complainant to hide it from her mother.
- Ques- The complainant said your wife called for a family meeting?
- Ans- Wife informed me that the complainant was not feeling good/ comfortable with the 'hug and kiss' to cheeks and forehead' as she's reaching a certain age- 15 years.
- Ques- Any mention of her allegations?
- Ans- Wife informed me that complainant not comfortable with hug/kiss.
- Ques- Wife talked about the allegation?
- Ans- Wife said – complainant not comfortable.
- Ques- Anything else?
- Ans- Yes- she mentioned **all** to me.
- Ques- Why the family meeting?
- Ans- When things arise- we discuss it. Traditional.
- Ques- objective of meeting?
- Ans- Reconciliation- relationship within the family.
- Ques- After meeting?
- Ans- Relationship- all good and respectful. **'I told my wife-hugging and kissing will stop.'**
- He was arrested on 18<sup>th</sup> October 2024. His wife asked the police for any warrant. The police said- later. She told him not to resist. Police did not say anything to him when he was being arrested.

- Ques- Any rights explained?
- Ans- Nothing at all. I asked them why he was taken to the police station. The police did not tell them the reason.
- 'I only came to know when I was told to go the court on the same evening.' He has been in remand since.

### **On Cross- Examination**

- Ques- Not having to do the washing- was that such a big occasion to hug and kiss the complainant?
- Ans- I used to do the hand washing of clothes. When I got the news from the complainant that my wife was getting a rental car to take the washing- I was very happy. I don't have to do any hand washing that weekend. With that 'happy feeling' in me, I hugged her, kissed her cheeks and forehead.'
- Ques- In a month, how many times do you take laundry for washing at Menen?
- Ans- Every Friday- depending on availability of rental.'
- Ques- you hug and kiss every week before taking clothes for washing?
- Ans- No. Only that Friday. First time to hire a rental to take the washing to the laundry.'
- Ques-you licked her neck while hugging her?
- Ans- Disagree.
- Ques- Lifted her from her thighs and carried her to the mirror?
- Ans-Disagree. Lifted her from her knee.
- Ques- Normal to lift her up?
- Ans – No- Happiness feeling in me. Lifted her from knees and did the same to 3-year-old daughter.
- Ques- You lay down on the mattress and invited the complainant to lie next to you?
- Ans - Disagree.
- Ques- You indecently touched her thighs and kissed her on the neck?
- Ans- Disagree.

### **Questioned by the Court**

- 'This was the first time for clothes to be taken to the laundry.'

12. **DW2- Susana Loloma** is a school teacher and is married to the accused. She is the complainant's mother. PW2 is her first husband and is the complainant's father. She testified that:

- On the day in question, she was calling and looking for rental cars. When she left to get the rental car after 5pm, the accused was not at home. She returned between 7.30-8pm. The accused and the complainant were home. She can't recall if her 3-year-old daughter was also home. There was excitement in the house. The accused was happy as after 2 weeks, they'll get their laundry done. She can't recall if laundry was done that evening or the next day. Sometimes the accused does the laundry at home.

- Ques- On 13<sup>th</sup> August, you spoke to the complainant about her phone?
- Ans- Correct. I knew she had a phone and it was working. She asked the accused to watch the complainant on her phone use. **On that day- she did not send the accused to go and look into her room.** The complainant spent a lot of time on her phone.
- Ques- The complainant told you of the accused sexually harassing her?
- Ans- On that day- No.
- Ques- When?
- Ans- She did a month later.
- Ques – What did she say?
- Ans- Complainant approached me after my argument with the accused and he walked out of the house. I was crying. The complainant was the only one with me. She hugged me and cried with me. She shared with me for the first time everything since the day of the incident. I was shocked and angry. I told my daughter to sit by my side and to wait for the accused. I told the accused that we need to talk. I asked the accused about everything that the complainant revealed to me- **her concerns not being comfortable around him.**
- Ques- What else?
- Ans- **Every detail of complainants' complaint, we discussed.**
- Ques- Outcome?
- Ans- The accused said – ‘those were fatherly cuddles and hugs.’
- Ques- Resolution?
- Ans- I told the accused he can't continue to hug my daughters. I reminded him my daughter was growing up and for him to know he's not the biological father of my daughters.
- Ques- Did he say anything?
- Ans- He apologised.
- Ques- After this meeting, did you speak to PW2, the complainant's father?
- Ans- No. I told the complainant to call her father and tell him everything that she told me. He called me on the complainant's phone. I told him what my daughter told me and our family meeting.
- Ques- What did he say?
- Ans- He said- “What are you waiting for? Report it to the police.’ I didn't report it.
- Ques- Why not?
- Ans- I don't understand the laws of Nauru. **I asked him to wait for December when we return to Fiji and I report it there.**
- She tried to go and see the complainant at the safe house but was denied access. Her former husband has legal custody of the complainant now. The complainant is back in Fiji. The DPP's office did not approach her to be a prosecution witness.

### **On Cross- Examination**

- The complainant confided in her after she got angry with her husband.
- Ques- She hugged and cried with you- did you believe her?
- Ans- **I believed her at that moment. Her other daughters had told her-‘Please tell Uncle Joji to stop hugging us- we're grown ups now.’**

- **She believed the complainant** as she was emotional and uncomfortable with the hugs.
- Ques- You didn't report it because you believed everything the complainant said and you wanted to report it in Fiji?
- Ans- **Not totally believe the complainant** but I wanted her to see that I took the responsibility to report the matter to police.
- Ques- Normal for accused to hug, kiss and lift your daughter in your presence?
- Ans- No, only hugging.
- Ques- Picking the complainant from the knees- is that normal?
- No. He said he expressed his excitement by lifting the complainant up.
- Ques- He expresses the same excitement in your presence?
- Ans- No.

### Questioned by the Court

- She had been renting vehicles before she got the twin-cab to take the laundry to Menen. The accused apologised to the complainant and herself.

### SUBMISSIONS BY THE PROSECUTION

13. In a rather brief submission, Mr Shah did not address each of the elements of the offence and how the evidence applies to all the elements. The absence of any reference to case-law to provide guidance on what the elements of the offence mean is a noteworthy omission on the prosecutions part. In particular, Counsel has not covered the element of 'whether the kissing / licking of the complainant's neck amount to 'touching that is indecent.' Counsel did not even mention Section 117(6) of the Crimes Act on the standard of 'an ordinary person' when dealing with the question of whether the 'touching' is 'indecent.'

### SUBMISSION BY THE DEFENCE

14. Mr Clodumar highlighted some inconsistencies in the evidence for the prosecution and looked at the following:
- Elements of Section 117- Indecent Act in relation to a child under 16 years old
  - The definition of 'touching under Section 117(5)
  - The definition of 'intention' under Section 17
  - The definition of 'Recklessness' under Section 19
  - What amounts to indecent assault? - *R v Doguape* [ 2021] NRSC 27; Criminal Case 13 of 2021 (27<sup>th</sup> July 2021); *R v Hartman* [2020] NRSC 7; Criminal Case 16 of 2019) 04<sup>th</sup> March 2020)
  - Counsel argues – 'his act of picking up the complainant, as he did, had no sinister motive or indecency to it.'
  - R v Debaio* [2019] NRSC 5; Case 21 of 2017 (19<sup>th</sup> March 2019)- on the credibility of the complainant 'and the mother's doubt (DW2- complainant's mother) as to the veracity of her daughter's allegation.
  - The accused is to be found not guilty and be acquitted.

## DISCUSSION

15. The elements of Section 117 (1) (a)(b)(c) Crimes Act 2016 are:

- i. The accused
- ii. Touched the complainant
- iii. The 'touching was *'intentional 'and 'indecent'*
- iv. The accused was *reckless* about the indecent touching
- v. ES was *under 16 years old*

16. On both counts, there is no dispute as to the identity of the accused. The allegations refer to two incidents where the accused 'intentionally touched' the complainant. The nature of the touching is 'licking' of the complainant's neck in Count 1 and 'kissing' of her neck in Count 2.

17. **Count 1-** It is alleged that the accused touched the complainant by 'licking her neck.' The accused does not deny 'touching' the complainant. He disputes the nature of the touching as described in the information and denies 'licking' her neck. Instead, the accused says that he 'hugged and kissed' the complainant on her cheek and her forehead. **Who is the court to believe?**

18. **Count 2-** it is alleged that the accused touched the complainant by kissing her neck. The accused does not deny kissing the complainant. He denies kissing her neck. He admits kissing her cheek and forehead instead. The element of the offence that the accused touched the complainant as per the meaning of 'touching' under Section 117(5) of the Crimes Act 2016 is satisfied for both Counts. Did the accused 'intentionally' kiss the complainant? Section 17(1) of the Crimes Act 2016 defines 'intention' as-

*'A person has 'intention' with respect to conduct, if the person means to engage in the conduct.'*

- In his testimony, the accused said that when the complainant told him that her mother had gone to get a rental car, he said -**'I was very happy. I know that I will not do hand-washing on that weekend.'**
- **'With the happy feeling, I hugged her and kissed her cheeks and forehead.'**

19. It is clear from the testimony that the accused 'meant to engage in the conduct of 'hugging, lifting the complainant up and kissing her. The complainant says that the accused 'licked' and kissed her neck and not her cheek or forehead. Once again, as in para [17] above, **who is the court to believe?** In *R v Bill, [2024] NRSC 25; Criminal Case 1 of 2023* (24<sup>th</sup> September 2024), I said:

'At common law, the credibility of a witness generally depends on the following factors:

- i. Knowledge of the facts on which the witness gives evidence;
- ii. Impartiality;
- iii. Integrity; and
- iv. Truthfulness.

20. In the present case, the issue of ‘truthfulness’ arises. Am I to believe the complainant or the accused as to whether she was kissed and licked on the neck or forehead and cheek? In *THE STATE OF WESTERN AUSTRALIA -v- COATES* [2007] WASC 307, BLAXELL J at [54] said this-

*‘The determination of a witness’ credibility on the basis of demeanour does not require the exercise of any legal skill, and is not something which can be the subject of reasoned analysis. It is largely a semi-intuitive process, and most ordinary members of the community have the life experiences which equip them to make such an assessment.’*

At [ 57], he said:

*‘Obviously, the assessment of each witness’ credibility will be a matter of critical importance in arriving at my findings of fact. It may be that I accept the whole of a witness’ evidence or that I reject it all. It may also be that I accept part of what a witness has had to say but reject the rest. The fundamental question in relation to each witness, and in relation to each matter the subject of his or her testimony, is **whether or not I believe the evidence**. The answer to this question will turn on my evaluation of a number of factors, including the **truthfulness of the witness**, the reliability of the observations made by him or her at the material time, and the accuracy of his or her recollections’*

At [58] Justice Blaxell said:

*‘Matters to be taken into account in this evaluation include the witness’ general demeanour whilst testifying, the consistency of the evidence (both within itself and with other evidence in the trial), personal characteristics such as powers of expression and apparent levels of intellect, the possible impact of alcohol or drugs, and the emotional state of the witness at the material time. **In the end, I should carefully assess all relevant matters and decide whether or not I can accept the witness’ evidence on a particular issue as being truthful and correct.**’*  
(My emphasis)

21. In *Excelerate Technology Ltd v Cumberbatch & Another* [2015] Lexis Citation 6, Queens’s Bench Division, at paragraph [9], Justice Simon Brown QC said this:

*‘ . The most compendious judicial statement on this is to be found in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 at p 431: “Credibility’ involves wider problems than mere ‘demeanour’ which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. **First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others?***

He added:

*'Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. **And motive is one aspect of probability.** All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'*

22. For the present case, the fundamental question in relation to the testimonies of the complainant and the accused is whether or not I believe their evidence. From the questions raised by Justice Simon Brown QC in *Excelerate Technology Ltd v Cumberbatch & Another [2015]* above, I pose the following:
- i. **Is the complainant a truthful or untruthful person?** The complainant, although growing up in a rather unsteady family surrounding, was clear and firm in her testimony. She was unwavering and steady, even under cross-examination. She testified that on happy occasions, the accused would hug and kiss her. When the accused entered her room, she testified- ***He asked to hug me. It was weird. I didn't want to hug him. He started to kiss my neck and started licking it. I pushed him away. The accused pointed at her mattress and told her to lie down there with him. She said -No. She told him to get out of her room. He did.*** **I found the complainant to be a credible witness and a truthful person.**
  - ii. **Is the accused a truthful or untruthful person?** The accused was equally clear in his testimony. There were a few inconsistencies though. He testified that the complainant's mother told him to peep through the window of the complainant's room and check whether she was using her phone. This is denied by DW2, the complainant's mother. He testified that he hugs and kisses the complainants on happy occasions. DW2, the accused's wife, to the contrary, said this-
    - Ques- Normal for accused to hug, kiss and lift your daughter in your presence?
    - Ans- No, only hugging.
    - Ques- Picking the complainant from the knees- is that normal?
    - No. He said he expressed his excitement by lifting the complainant up.
    - Ques- He expresses the same excitement in your presence?
    - Ans- No.
  - iii. When the accused was cross examined about the family meeting, this transpired:
    - Ques- Any mention of her allegations?
    - Ans- Wife informed me that complainant not comfortable with hug/kiss.
    - Ques- Wife talked about the allegation?
    - Ans- Wife said – complainant not comfortable.

- Ques- Anything else?
  - Ans- Yes- **she mentioned all to me.**
- iv. In contrast, DW2, the complainant's mother said:
- She hugged me and cried with me. She shared with me for the first time everything since the day of the incident. I was shocked and angry. I told my daughter to sit by my side and to wait for the accused. I told the accused that we need to talk. I asked the accused about everything that the complainant revealed to me- her concerns not being comfortable around him.
  - Ques- What else?
  - Ans- **Every detail of complainants' complaint**, we discussed.
- v. On every detail of the complaint- when questioned by the court, the complainant said-
- What did your Mom ask the accused in Fijian?
  - Translates to:
  - Ques- Is it true you gave a can of beer to the complainant to drink?
  - Ques- Is it true, when the complainant is sleeping, you peep through her windows?
  - Ques- Is it true that you entered her room and kissed her neck?
- vi. On being questioned about the number of times the family takes their laundry to Menen Hotel, the accused had different versions. In **cross examination**, he said:
- Ques- In a month, how many times do you take laundry for washing at Menen?
  - Ans- **Every Friday**- depending on availability of rental.'
  - Ques- you hug and kiss every week before taking clothes for washing?
  - Ans- No. Only that Friday. **First time** to hire a rental to take the washing to the laundry.'
  - When questioned by the court- the accused said: • 'This was the first time for clothes to be taken to the laundry.'
  - DW2, the complainant's mother, in contrast said- • She had been renting vehicles before she got the twin-cab to take the laundry to Menen.

23. Paragraphs [24] (ii)- (vi) show some inconsistencies in the accused's evidence. I find that the accused, though appearing to be a truthful person in his steady and clear answers, he was being selective and telling something less than the truth on the nature of his 'touching' the complainant, being asked by DW2 to peep through the complainant's window, the details of what his wife asked him at the family meeting regarding the allegations of the complainant and the number of times they had been taking their laundry to Menen. I therefore find the accused to be an untruthful person and I don't believe his evidence as regards the allegations of the complainant. I find, that the accused touched the complainant by 'licking her neck' in Count 1. I also find that the accused touched the complainant by 'kissing' her neck as in Count 2. On both Counts, I find that the accused 'meant to engage' in the 'licking' and the 'kissing' of the complainant's neck as per the definition of 'intention' in Section 17 of the Crimes Act 2016.

24. I now have to consider **whether the touching by 'licking' and 'kissing' of the complainant's neck were 'indecent.'** Section 117(6) of the Crimes Act 2016 provides:

*'The question whether touching or any act is indecent is one of fact to be determined by applying **the standards of an ordinary person.**'*

25. In *Republic v Doguape* [2021] NRSC 27; Criminal Case 13 of 2021 (27 July 2021), Fatiaki CJ observed:

40. *In R v Stanley* [1965] 2 QB 327 Lord Parker CJ ruled that to be “indecent” the publication in that case would need to be highly offensive against the recognised standards of common propriety. In *Nauru*, however the standard is that “**...of an ordinary person**”.

41. *In most cases the indecent nature of the act(s) complained about presents no difficulty. Most often, the act is of a sexual nature involving the victim’s breasts and/or genitalia or it may be an act of intimacy that offends the modesty of the victim such as uninvited caressing or kissing or it may even include exposure of the male genitalia and/or masturbation as occurred in Republic v Hartman* [2020] NRSC 7.

42. *In this regard the House of Lords in R v Court* (1988) 2 ALL ER 221 explained:

*“To decide whether or not a right-minded person might think that the assault was indecent, the following factors were clearly relevant: **the relationships of the accused to his victim (were they relatives, friends or virtually complete stranger?) how had the accused come to embark on this conduct and why was he behaving in this way?....**”*

26. At [43] Fatiaki CJ said”

‘43. Of greater relevance however, to the circumstances of the present case, are the observations of Lord Griffiths where he said *ibid* (at p 223):

*“The **gravamen** of the offence of indecent assault is the **element of indecency**. It is this element...that distinguishes the offence from common assault ...*

*...**By indecency is meant conduct that right-thinking people will consider an affront to the sexual modesty of a woman.***

*Although the offence of indecent assault may vary greatly in its gravity.....there is agreement that the **offence cannot be committed accidentally.....** Once this concession is made it is apparent that some extra mental element is required than that necessary for common assault..... this mental element should be that which constitutes the essence of the offence, **namely an intent to do something indecent to a woman in the sense of an affront to her sexual modesty.....** **Indecent assault is after all a sexual offence appearing in (Our PART 7 - SEXUAL OFFENCES)** and one should on general principle look for a sexual element as an ingredient of the offence.”*

27. In *Republic v Ignazio-Iyongo Aubiati*, Criminal Case 15 of 2023, I referred to

“In *R v Harkin* (1989) 38 A Crim R 296 (NSW CCA) Lee J said:

*‘[I]f there be indecent assault **it is necessary that the assault have a sexual connotation**. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of*

*the assault. The genitals and anus of both male and female and the breast of the female are relevant areas...'*

28. From the above, I note that the offence of indecent assault cannot be committed accidentally. For touching to be indecent- (a) It has to be of a sexual nature or have a sexual connotation OR (b) It must have the intent to do something indecent to a woman OR (c) *The area of the body of the perpetrator and the victim- involved in the touching, are relevant. The genitals and anus of both male and female and the breast of the female are relevant areas...'* OR (d) *conduct or touching that right- thinking people (in Nauru- it's the ordinary person') will consider an affront to the sexual modesty of a woman.'*
29. In the present case, the 'touching' involved the 'licking' and the 'kissing' of the complainant's neck. Are those acts indecent? I note that according to both the complainant and the accused, he had hugged the complainant in the past. He had kissed the complainant in the past too. According to the complainant, the previous kisses were on her forehead. According to the accused's wife, DW2, she had seen the complainant hug her daughters before. Kissing? No.
30. What is different about the "licking' and 'kissing' of the complainant's neck on this occasion? On a 'kiss' as an example of indecent assault- R v Pahuja (No 2) (1989) 50 SASR 551; 40 A Crim R 252 (CCA) White J said at (553; 254)  
*'Whatever might be the situation where a young girl misinterprets the manner or the reason for massaging her chest in the breast area, there could not be any like immature misinterpretation of a kiss and / or the insertion of the tongue into her mouth. If either or both these two latter things happened they would necessarily constitute indecent assaults.'*
31. In R v Leeson (1986) 52 Cr App R 185 (CA) Diplock LJ said (at 187):  
*'This court has no doubt that where an assault of this kind involving the kissing of a girl against her will is accompanied by suggestions that sexual intercourse should take place or that sex play should take place between them, the assault is an indecent one.'*
32. In the present case, the complainant clearly said that she did not want to hug the accused. When she was kissed and licked on her neck and lifted up by her thighs, she was asked:  
Ques- How did you feel?  
Ans- I was scared and felt disgusted.  
She told him to put her down and to leave his room.  
This clearly shows that the accused kissed and licked the complainant's neck **against her will.**
33. Do the 'licking' and 'kissing' of the neck have any sexual connotations? After 'touching' the complainant, this transpired:  
*'My mattress was on the floor. He pointed to my mattress and told me to lie down there with him. I said-No and told him to get out of my room.*  
Ques- How did you feel?  
Ans- I was angry and scared.

34. The prosecution did not establish the actual words used by the complainant during this exchange. In applying the standards of an ordinary person under Section 117 (6), I find that the accused, in hugging, licking and kissing the complainant's neck- accompanied by the suggestion that she lie with him on her mattress- there is a sexual element here. I find that this amounts to the 'touching' being sexual in nature in both Counts 1 and 2. I conclude that the accused intentionally kissed and licked the complainant's neck. Coupled with the accused's suggestion that the complainant lie next to him on her mattress, this makes the two incidents of touching – of licking and kissing the neck of the complainant- indecent. Thus the element of indecency which is the **gravamen of the offence of indecent assault**, is satisfied here. I further find that the accused was reckless in his conduct and that the complainant is under 16 years old.

35. I remind myself that the burden of proof under Section 25 of the Crimes Act 2016 rests with the prosecution. Am I satisfied beyond reasonable doubt that the accused committed the offences as charged? What does the term 'beyond reasonable doubt mean? In Keeley v Brooking 1979) 143 CLR 162; 25 ALR 45 Barwick CJ said:

*'To be satisfied beyond all reasonable doubt is, for the purposes of the law, to be certain.'*

## CONCLUSION

36. Considering in totality the evidence in this case, I am certain that the accused committed the offences in both Counts 1 & 2.

37. My findings are:

- i. Count 1- Guilty;
- ii. Count 2- Guilty.

DATED this 18<sup>th</sup> of July 2025.

  
Kiniviliame T. Keteca

Judge.

