

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 202 of 2019

STATE

V

SAILOSI JOE TABUALEVU OSBORNE

Counsel : Mr. J. Nasa for the State.
: Mr. K. Maisamoa for the Accused.

Dates of Hearing : 18, 19, 20, 22 July, 2022
Closing Speeches : 22 July, 2022
Date of Judgment : 25 July, 2022

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "A.L")

1. The Director of Public Prosecutions charged the accused by filing the following information:

SAILOSI JOE TABUALEVU OSBORNE is charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SAILOSI JOE TABUALEVU OSBORNE on the 28th day of October, 2019 at Nadi in Western Division penetrated the vagina of “AL” with his fingers, without the consent of the said “AL”.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SAILOSI JOE TABUALEVU OSBORNE on the 29th day of October, 2019 at Nadi in Western Division indecently and unlawfully assaulted “AL” by touching her buttocks.

2. In this trial, the prosecution called three witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of both the offences as charged.

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.

ELEMENTS OF THE OFFENCE

RAPE

4. In respect of the first count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his fingers;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

5. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his fingers without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

6. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.

7. The second element is the act of penetration of the complainant's vagina by the fingers. This element is in dispute.

8. The third element of consent is in dispute. Consent means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

9. If this court is satisfied that the accused had penetrated the vagina of the complainant with his fingers and she had not consented, then this court is required to consider the last element of the offence that is whether the

accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.

10. To answer the above this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
11. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his fingers into the complainant's vagina without her consent then this court must find the accused guilty as charged.
12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused fingers is sufficient to satisfy the act of penetration.

INDECENT ASSAULT

14. To prove the second count 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 complainant by touching her buttocks.

15. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.
16. 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.
17. Assault is the unlawful use of force on the complainant by the act of touching her buttocks.
18. In respect of the count of indecent assault 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 touching her buttocks.
19. 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 of the offence of indecent assault. 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.
20. As a matter of law, I 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.

21. In this case, the accused is charged with two offences, I have borne in mind that the evidence in each count is to be considered separately from the other. It is not to be assumed that because the accused is guilty of one count that he must be guilty of the other as well. This also applies to the outcome of not guilty.

ADMITTED FACTS

22. In this trial, the prosecution and the defence have agreed to certain facts titled as Admitted Facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
23. 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

24. The complainant informed the court that in October 2019 she was working at a Hotel in Denarau, Nadi and renting a flat at Nawaka with Masilini, Rositalei, Taraivini, the accused and Matia Masilini's brother.
25. The flat had two bedrooms, one was occupied by the complainant, Masilini and Rositalei whereas the other one was occupied by Taraivini and her boyfriend the accused. On 28th October, 2019 at about 5.30 pm the complainant came home from work she saw the accused and Matia drinking wine in the sitting room and Masilini cooking in the kitchen.

26. The complainant was tired so went to her bedroom changed her work clothes to a black shorts and a t-shirt and went to sleep on a mattress. Whilst sleeping she felt someone touch her private part. She opened her eyes and saw the accused, by this time he was on top of her.
27. The complainant wanted to shout but the accused blocked her mouth with his left hand. She tried to turn but she could not because the accused was heavy and strong. When she again tried to shout she could not because the accused was blocking her mouth. He then fisted her right thigh it was painful and she cried. She was able to see the accused because she was lying next to the window and the light from the outside was enough for her see the accused.
28. The accused pulled his pants down and told the complainant to touch his testicles. The complainant continued to struggle with the accused, she wanted to shout but could not because the accused was blocking her mouth and was lying on top of her.
29. The complainant was wearing a loose black shorts, the accused moved her shorts and panty aside and put his finger in and out of her vagina. This lasted for less than a minute and it was painful. According to the complainant, the accused had moved her shorts and panty to the side from the bottom end. She started crying and tried to move herself but could not.
30. At this time, someone broke the bedroom door and came into the room. When the light was turned on it was Masilini, the accused stood up, his pants were at his knees and he ran to a corner in the bedroom. Masilini scolded the accused, he told Masilini not to inform Taraivini his girlfriend about what had happened.
31. The complainant ran out of the room crying and went to the porch of the house. Rositalei was in the sitting room, after a while Masilini came and

- asked the complainant about what happened in the bedroom. The complainant told Masilini about what the accused had done to her. The complainant and Masilini made numerous calls to the police but the call did not connect. After an hour the complainant went to sleep.
32. The next day 29th at about 6 am the complainant went to the sink outside the flat to brush her teeth. The accused also came, after brushing her teeth as she was going into the flat the accused touched her buttocks with his hand. The complainant screamed ran inside the house and told Masilini and Rositalei. When the accused touched her buttocks she was scared.
 33. The complainant told Masilini and Rositalei that after she brushed her teeth the accused came outside and touched her buttocks. Thereafter, the complainant, Masilini and Rositalei went to work since they were working together.
 34. On 30th October, the matter was reported to the police. The complainant stated that she did not allow the accused to do what he had done to her. The complainant identified the accused in court.
 35. In cross examination, the witness denied that she had a few glasses of wine before sleeping she agreed if the door of the bedrooms were open, anybody in the sitting room will be able to see the inside of the two bedrooms. The complainant stated when she slept the door of her bedroom was not closed.
 36. When it was put to the complainant that the accused did not do anything to her, she stated that when she fell off to sleep she was facing the ceiling and she felt someone was touching her private part. Although it was dark in the bedroom the light from the outside came into the room through the window, there were two windows on each side of the room. The windows

window, there were two windows on each side of the room. The windows were open that night and the complainant agreed that there was enough light to see.

37. She stated the accused put his finger into her vagina after he punched her thigh and she started to cry. When it was suggested when she woke up she could have immediately shouted the complainant stated *“I opened my eyes and I saw Sailosi at that point in time he blocked my mouth.”* The complainant agreed that in her evidence she told the court that when the accused pulled down his pants he told her to touch his testicles.
38. The complainant was referred to line 40 of her police statement dated 30th October, 2019 which was read as:

When Sailosi saw Masilini he quickly got off me, pulled his red basketball trousers up and went and stood in one corner. Sailosi told Masilini not to tell his girlfriend what she saw but Masilini chased him out of the room. I ran outside crying because of what happened. Then again the next morning at about 5am, when I went to have my shower, Sailosi touched me on my left side of my bum.

39. The complainant again maintained that the accused had asked her to touch his testicles. When asked to show where in her police statement this was mentioned, the complainant referred the court to lines 20 to 25. It was read as follows upon the request of the defence counsel:

Sailosi then removed his red basketball trousers with one hand while he covered my mouth with another. After he removed his trousers, he told me to touch his penis but I said no, even with his hand covering my mouth. When I said no, he slapped me on my left cheek. After slapping me, I started crying, he then kissed me on the left side of my neck and tried sucking my lips.

40. When asked which version was the truth, the complainant stated the one she told the court that is the accused had asked her to touch his testicles. The complainant agreed when Masilini came into the bedroom the accused trousers were on his knees.
41. The complainant maintained that the accused had put his finger in and out of her vagina in a fast manner. In respect of the second count, the complainant stated when she was brushing her teeth the accused came outside. When she was about to go inside the flat the accused touched her buttocks. The complainant maintained that the accused had touched her buttocks that morning. She did not lie or fabricate a story against the accused.
42. The next witness, Masilini Natavura informed the court that on 28th October, 2019 she arrived home at about 5.30pm. At home Rositalei, Matia and the accused were drinking, the witness went into the kitchen to cook.
43. According to the witness, the complainant had come home at 5.30pm and went into her bedroom. As the drinking continued the accused came and asked the witness if he can go and call her brother Matia from the bedroom. Matia had gone into the bedroom of the complainant to lie down. According to the witness, she trusted the accused so she allowed him to go into the bedroom.
44. While having dinner, Rositalei asked the witness to go and check since the accused was taking a long time in the bedroom. The witness went and tried to open the door but it was locked from inside. She was knocking on the door and calling the accused. There was no response so she banged on the door the lock broke and she went inside the room.

45. When she switched on the light, she saw the accused's pants were down, one hand was on the mouth of the complainant and the other hand at her bottom. The complainant was moving and struggling with the accused. When the accused saw her, he stood up and she saw his testicles. The accused pulled his pants up and ran into a corner.
46. When the accused was in the corner, he said to the witness not to inform his girlfriend, the witness told the accused that she will report the matter to the police. The complainant was crying and she ran outside to the porch.
47. Shortly after, the witness went to where the complainant was crying. The complainant told the witness that the accused did something to her she did not ask anything further and left the complainant crying. Thereafter, the witness told Rositalei, she did not complete her story because she did not believe the accused would do that. According to the witness Taraivini was not in the flat who had gone to see her mother at Sabeto.
48. The next day 29th, the witness was getting ready to go to work when the complainant came into the room and told her that the accused had touched her buttocks. After work the witness told the accused girlfriend Taraivini in the presence of Rositalei and the accused about what the accused had done, Taraivini did not believe the witness. The accused sought forgiveness but the witness told him that she will still report the matter to the police.
49. In cross examination, the witness stated that the complainant came home at almost 6 pm and went straight to her bedroom. She agreed that the accused was angry after Matia went into the bedroom of the complainant. Upon further questioning the witness stated that she had taken Matia into the bedroom made him lie in one corner while the complainant was in

another corner. When the accused went into the bedroom he had closed the door.

50. The witness maintained when she went inside the bedroom she saw the complainant moving and the accused hand on her mouth. She denied the suggestion that it was her brother Matia and not the accused and that she was covering up for him.
51. The witness further stated that she saw the accused with his other hand press the thigh of the complainant and was lying on top of the complainant. When the accused stood up she saw his testicles. At this time Matia was sleeping in the corner. The witness stated that she had told Taraivini what the accused had done after which the accused asked for forgiveness stating that he was drunk. The witness denied that in the presence of Rositalei she had mentioned to Taraivini that the complainant was lying.
52. The witness was referred to her police statement dated 30th October, 2019 which was read in court in its entirety:

I am residing in the above mentioned address for the past four months. I can clearly state that on Monday the 28th October, 2019, at about 4pm, my brother namely Matia and my friends boyfriend namely Sailosi Osbourne. Then at about 5.30pm my roommate namely "AL" came home from work. "AL" was so tired that she went to sleep. I was cooking and I saw Sailosi take a glass of wine from the kitchen to "AL".

I could hear Sailosi forcing "AL" to drink. Sailosi went outside and continued drinking with my brother Matia. After a while Matia said that he was too drunk and he went off to sleep in my room. Sailosi got angry that Matia and "AL" were sleeping in the same room. As I was having my dinner Sailosi

came to ask me if he could go to my room to wake up Matia. I trusted him so I said yes. Sailosi then entered my room. After a while another room mate of mine namely Rositalei told me to check on Sailosi, because he was taking too long.

I went to open the door, that's when I realized it was locked. So I forced open the door by pushing it open. When the door opened I switch on the light, I saw Sailosi on top of "AL" and his hands were covering "AL's" mouth and his pants were down to his ankles. As soon as he saw me he stood up and pulled his pants up. Sailosi went into one corner and stood there. Sailosi then told me not to tell his girlfriend anything. I then chased him home and tried to call the police but my call couldn't call go through due to bad network. At this point, "AL" was crying and later she ran out the bedroom towards the sitting room.

53. The witness agreed when she told the court that the accused was pressing the complainant's thigh and she had seen the accused testicles that night in the bedroom were not in her police statement. She explained that she had told the police officer these things but it was not recorded in her police statement. The police officers had even come to the flat she even showed them the door and the windows in the bedroom but it was never recorded in her police statement.

PREVIOUS INCONSISTENT STATEMENT

54. This court directs its mind to the fact that the defence counsel during cross examination of the complainant and Masilini had questioned these witnesses about some inconsistency in their police statement which they had given to the police when facts were fresh in their minds with their evidence in court.

55. This court is allowed to take into consideration the inconsistencies between what these witnesses told the court and their police statements when considering whether these witnesses were believable and credible. However, the police statement is not evidence of the truth of its contents.
56. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
57. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witnesses. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistencies are so fundamental, then it is for this court to decide to what extent that influences the reliability of these witnesses evidence.
58. The witness stated that although the complainant was her cousin sister she told the court whatever she had seen.
59. The final prosecution witness Buna Rositalei informed the court that on 28th October, 2019 at about 5.30 pm she came home, she was drinking wine with the accused, Matia and Masilini. Whilst dinking the complainant came around 6 pm and went straight to her bedroom. Masilini was cooking after a while the accused asked Masilini if he could go and wake Matia who was sleeping in the complainant's bedroom.
60. Masilini is the sister of Matia after Masilini said yes, the accused went into the bedroom where the complainant was sleeping. The witness was in the sitting room drinking she saw the accused close the bedroom door after he went inside.

61. After sometime the witness asked Masilini to go and call the accused since he was taking too long in the room. Masilini went and knocked on the door and called out the name of the accused and the complainant to open the door. When there was no response Masilini broke the door. The witness heard Masilini ask the accused in a loud voice "*Why did you do that? Why did you do that?*" Suddenly, the complainant ran out of the bedroom and went straight to the porch she was crying, looked scared and frightened.
62. Masilini followed the complainant and both had a conversation, after this Masilini came inside the flat and told the witness that the accused did something to the complainant the accused had closed the complainant's mouth and punched her thigh.
63. Next morning on the 29th the witness saw the complainant go and brush her teeth in the sink outside. At this time, the witness was near the sink inside the kitchen within minutes the complainant came running and told the witness who was in the sitting room that the accused had touched her buttocks.
64. According to the witness on the 28th Taraivini was not drinking with them, Taraivini had gone to Sabeto to her mother's house after work on this day and returned to the flat the next day 29th in the afternoon after work.
65. In cross examination, the witness told the court that Masilini had told her that when she went into the bedroom she saw the accused covering the complainant's mouth punched her thigh and was pressing it.

RECENT COMPLAINT EVIDENCE

66. Complainant's 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.
67. 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 in respect of the first count what weight would be given to the fact that the complainant told Masilini after the alleged incident (during the night of 28th) that the accused had done something to her after she left her bedroom and went to the porch of the flat. In respect of the second count in the morning of the 29th the complainant told Masilini and Rositalei by running to them that the accused had touched her buttocks.
68. This is commonly known as recent complaint evidence. The evidence given by Masilini and Rositalei is not evidence of what actually happened between the complainant and the accused since these witnesses were not present and did not see what had happened between the complainant and the accused.
69. 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 told Masilini immediately after she left the bedroom about what the accused had done to her briefly due to her distressed state. The important aspect of this is that she told Masilini that the accused had done something to her. Next morning the

complainant told both Masilini and Rositalei that the accused had touched her buttocks within minutes of its happening.

70. The prosecution submits that the complainant had given relevant and important information about what the accused had done to her on both occasions which was sufficient to alert Masilini and Rositalei. The prosecution also says there was no need for the complainant to go into every detail of what had happened to her when narrating the incidents due to the fact that she was scared of what the accused had done to her therefore she is more likely to be truthful.
71. On the other hand, the accused says the complainant had made up a story against him. The accused has been a trusted flat mate of the complainant he had gone into the bedroom of the complainant to wake Matia. He did not do anything to the complainant that night as alleged. The next morning he did not see the complainant brushing her teeth and there is no way he would have touched her buttocks. If he had she would have yelled which would have been heard by the other flat mates. The complainant has made up false allegations against him and therefore she should not be believed.
72. It is for this court to decide whether the evidence of recent complaint helps in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is a matter for this court to decide whether it accepts the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
73. This was the prosecution case.

DEFENCE CASE

74. 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 and also called three witnesses. This court must also consider the defence evidence and give it such weight as is appropriate.
75. The accused informed the court that at about 4 pm on 28th October, 2019 he was drinking wine at the rental flat with Rositalei and Matia. Masilini was cooking, the complainant and Sainiana joined in later together with his girlfriend Taraivini. The complainant had joined them between 6 pm to 6.30 pm. Taraivini after having two glasses left for Sabeto, however, the drinking continued with Rositalei, Matia and the complainant and they were later joined by Masilini.
76. At around 10 pm Taraivini came back and at this time the complainant went to sleep, however, it was around 9 pm Matia had gone to sleep. Both Matia and the complainant went to sleep in the same room.
77. After sometime the accused went into the complainant's room, the door was open it was not dark inside because the kitchen light was on. In the bedroom he saw Matia, the complainant and Sainiana sleeping the reason why he had gone into the bedroom was to wake Matia.
78. After waking Matia he woke the complainant and told her to drink some more since there were some drinks left. After entering the room he had closed the door. The accused denied that he had penetrated the vagina of the complainant with his finger. According to the accused the complainant had lied he did not do anything as mentioned in court by the complainant

in her bedroom. Not only the complainant but Masilini had also lied in court.

79. When the accused was in the bedroom Masilini and Rositalei were in the living room. The accused also denied touching the buttocks of the complainant the next morning he maintained that he told the truth in court. However, the complainant and Masilini did not.
80. In cross examination, the accused said it may be that Masilini was knocking on the door and calling his name. He stated that Masilini had pushed the door open which was not locked. The accused agreed it was Masilini who had immediately switched on the light in the bedroom. He also agreed that he was wearing a red basketball shorts that night.
81. The accused denied that he had done anything wrong in the bedroom to the complainant as seen by Masilini or told by the complainant in her evidence. The accused maintained that he did not do anything as alleged. He denied having a conversation with Masilini in the room as well.
82. However, the accused stated that Masilini had told him to leave the bedroom. In respect of the suggestion that Masilini at this time had told him she had seen what he was doing to the complainant and that she will report this to the police the accused stated "*she only said that because she saw me lying beside her and not on top of her.*"
83. The accused agreed that Masilini had told him that she would report him to the police. According to the accused Masilini was threatening him at this time.
84. The accused said in the morning of 29th he did not go outside to the sink or follow the complainant or see her brushing her teeth. He even did not see Rositalei standing by the kitchen that morning. The accused denied the allegation that he had touched the buttocks of the complainant.

85. The accused denied that Taraivini had returned to the flat in the afternoon of 29th he stated that this was a lie. According to the accused Taraivini had come back from Sabeto on the same night of the 28th with Sainiana. He agreed in the afternoon of 29th there was a discussion with Rositalei, Masilini, Taraivini and the complainant at the flat after work.
86. During the discussions Masilini had told Taraivini about what she had seen in the bedroom but the accused denied that he had apologized saying that he was drunk. He further denied that he had apologized in the presence of the complainant and Rositalei. The accused stated that Rositalei, Masilini and the complainant had made up a story against him.
87. In re-examination the accused said that Sainiana was also in the bedroom where the complainant was sleeping and that Masilini, Rositalei and Taraivini were sitting in the lounge.
88. The second defence witness Adi Taraivini Nasau informed the court that she is the wife of the accused. On 28th October, 2019 she was doing afternoon shift ending at 7pm. She arrived at her flat at about 8pm the accused was drinking with Matia and Rositalei while Masilini was in the kitchen cooking and the complainant was in her bedroom. After a while the complainant came and joined everyone and was talking with the witness.
89. The witness left for Sabeto with Rositalei's sister Sainiana and they returned at about 10pm. When the witness returned with Sainiana the drinking was continuing. The complainant went to sleep late in the night and Matia went to sleep during the early hours of the morning at around 3 am. Matia went to sleep in the complainant's bedroom.
90. During the drinking session the witness and the accused fought and went into their bedroom. However, the witness did not know or remember what she was arguing with the accused for. On the night of the allegation

nothing happened between the accused and the complainant since she was with the accused.

91. The witness stated that she came to court to tell the truth. She also stated that she knows what her husband has been charged for when asked to explain she said "*I don't really know it's something like false assault*" and that she wants to save her husband that's why she wants to tell the truth.
92. In cross examination, the witness agreed that she told the court that she wants to save the accused and that is why she has come to court to tell anything and everything in order to save him. The witness agreed when she knocked off from work on 28th October, 2019 she went to her parents place in Sabeto to pick an item and in the afternoon of the 29th she returned to the flat in Nawaka.
93. When she arrived at the flat Masilini, Rositalei and the complainant in the presence of the accused had a discussion with her about the incident. The witness denied that it was Masilini who had told her about what the accused had done to the complainant. When further questioned the witness said there was no discussion about what had happened between the accused and the complainant.
94. The witness agreed with the suggestion that at no point in time she was in the house when the incident happened in the bedroom and that she had gone to Sabeto.
95. In re-examination the witness stated that she went to Sabeto on the 28th and returned on the same night.
96. The third defence witness Sainiana Natuicake informed the court that she is the sister of Buna Rositalei and on 28th October, 2019 she and Taraivini left the flat for Sabeto. Both returned to the flat at about 11pm. Matia went to sleep at 1 am sharp before the drinks finished and the complainant

went to sleep before Matia. The witness had also gone to sleep she does not know what happened after she went to sleep.

97. In cross examination, the witness stated that on the 28th she came back from Sabeto to Nawaka. She denied returning the next day in the afternoon.
98. The final defence witness Mousheem Khan graduated with an MBBS degree from the University of Fiji in 2013 and has 9 years of experience as a Medical Practitioner.
99. On 30th October 2019 the witness was based at the Nadi Hospital. At about 8.30 am he had examined the complainant. The patient had stated that she was sexually abused on 28th October whereby the drunken perpetrator had penetrated the patient's vagina with his fingers.
100. The specific medical findings were:
 - a) No hymen present;
 - b) No bruise noted;
 - c) No hematoma noted;
 - d) No bleeding;
 - e) No abrasions; and
 - f) No scars.
101. According to the witness there was no sign of any forceful penetration seen on the complainant's body. Any such entry will cause a lot of soft tissue injuries or small cuts, bruises, even deep cuts if someone tries to sexually abuse and the victim tries to defend there will be some sort of scars or abrasions, scratches or marks on the private region.
102. The witness stated based on his medical findings he couldn't find anything on the patient that would have indicated that something happened.

Medically, he could not say that the patient was sexually abused. The Fiji Police Medical Examination Form of the complainant dated 30th October, 2022 was marked and tendered as defence exhibit no. 1.

103. In cross examination, the witness agreed that he had written “*cannot rule out sexual abuse*” in the context that medically for sexual abuse there has to be evidence of laceration or bruises or any signs of forceful penetration or forceful entry. In this case, he did not see anything on the patient’s body or private part that would suggest that any sexual activity or any kind of abuse had taken place.
104. The witness further stated if there was any injury caused by the penetration of the finger into the vagina it would not have healed in 2 days. The witness agreed that generally not every female who is subjected to experiences of penetration of their vagina by a finger will sustain injuries.

DIRECTION ON EXPERT EVIDENCE

105. This court has heard the evidence of Dr. Khan who had been called as an expert on behalf of the defence. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in his evidence as a whole is to assist this court.
106. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed,

this court does not have to accept even the unchallenged evidence of the doctor.

107. This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.

108. This was the defence case.

ANALYSIS

109. The prosecution alleges that on 28th October, 2019 the complainant returned from work at around 5:30 pm since she was tired she went into her bedroom changed her work clothes wore a black shorts and a t-shirt and went to sleep on a mattress. Whilst sleeping she felt someone touch her private part. She opened her eyes and saw the accused, by this time he was on top of her.

110. The accused blocked her mouth with his left hand. She tried to turn but could not because the accused was heavy and strong. When she again tried to shout she could not because the accused was blocking her mouth. He then fisted her right thigh it was painful and she cried.

111. The complainant continued to struggle with the accused who was lying on top of her since the complainant was wearing loose shorts, the accused moved her shorts and panty aside and put his finger in and out of her vagina. This lasted for less than a minute and it was painful. She started crying and tried to move herself but could not.

112. At this time, Masilini broke the bedroom door and came into the room. When the light was turned on by Masilini, the accused stood up, his pants were at his knees and he ran to a corner in the bedroom. Masilini scolded the accused, he told Masilini not to inform Taraivini his girlfriend about what had happened.
113. The complainant ran out of the room crying and told Masilini about what the accused had done to her. The complainant and Masilini made numerous calls to the police but the call did not connect.
114. The next day 29th at about 6 am the complainant went to the sink outside the flat to brush her teeth. The accused also followed, as the complainant was going into the flat the accused touched her buttocks. The complainant screamed ran inside the house and told Masilini and Rositalei.
115. Masilini Natavura was the one who had forcefully opened the bedroom door after the accused had locked it from inside. When Masilini switched on the light, she saw the accused's pants were down, his one hand was on the mouth of the complainant and the other hand on her bottom. The complainant was moving and struggling with the accused when the accused saw her, he stood up pulled his pants up and ran into a corner.
116. When the accused was in the corner, he said to the witness not to inform his girlfriend, Masilini told the accused that she will report the matter to the police. The complainant was crying and she ran outside to the porch.
117. The complainant told Masilini that the accused did something to her Masilini did not ask anything further because the complainant crying. The next day, Masilini was getting ready to go to work when the complainant came into the room and told her that the accused had touched her buttocks. After work Masilini told the accused girlfriend Taraivini in the

presence of Rositalei and the accused about what the accused had done. The accused sought forgiveness.

118. Buna Rositalei informed the court that after Masilini broke the door and went into the complainant's bedroom she heard Masilini ask the accused in a loud voice "*Why did you do that? Why did you do that?*" Suddenly, the complainant ran out of the bedroom and went straight to the porch she was crying, looked scared and frightened.
119. Next morning Rositalei saw the complainant go and brush her teeth in the sink outside. Within minutes the complainant came running and told Rositalei that the accused had touched her buttocks.
120. According to Rositalei on the 28th Taraivini was not drinking with them, Taraivini had gone to Sabeto to her mother's house after work on this day and returned to the flat the next day 29th in the afternoon after work. The complainant did not consent for the accused to do what he did to her on both occasions.
121. On the other hand the accused denied any wrong doing he stated that the prosecution witnesses had made up a story to falsely implicate him. The defence says all were living like a family there was trust and harmony between all of them.
122. The accused was drinking wine with Rositalei and Matia. Masilini was cooking, the complainant and Sainiana joined in together with Taraivini. Taraivini after having two glasses left for Sabeto, however, the drinking continued with Rositalei, Matia and the complainant and they were later joined by Masilini.

123. At around 10 pm Taraivini came back and at his time the complainant went to sleep, however, it was around 9 pm Matia had gone to sleep. Both Matia and the complainant went to sleep in the same room.
124. After sometime the accused went into the complainant's room, the door was open it was not dark inside because the kitchen light was on. In the bedroom he saw Matia, the complainant and Sainiana sleeping the reason why he had gone into the bedroom was to wake Matia.
125. After waking Matia he woke the complainant and told her to drink some more since there were some drinks left. After entering the room he had closed the door. The accused denied that he had penetrated the vagina of the complainant with his finger. According to the accused the complainant had lied in court he did not do anything in the complainant's bedroom as mentioned by the complainant. Not only the complainant but Masilini also lied in court.
126. The accused also denied touching the buttocks of the complainant the next morning he maintained that he told the truth in court and the complainant and Masilini did not.
127. Adi Taraivini Nasau arrived at her flat at about 8pm on the 28th. The accused was drinking with Matia and Rositalei while Masilini was in the kitchen cooking and the complainant was in her bedroom. After a while the complainant came and joined everyone and was talking with the witness.
128. The witness left for Sabeto with Rositalei's sister Sainiana and they returned at about 10 pm. When the witness returned with Sainiana the drinking was continuing. The complainant went to sleep late in the night and Matia went to sleep during the early hours of the morning at around 3 am.

129. On the night of the allegation nothing happened between the accused and the complainant since she was with the accused.
130. Sainiana Natuicake informed the court that on 28th October, 2019 she left the flat for Sabeto with Taraivini. Both returned to the flat at about 11pm. Matia went to sleep at 1 am sharp before the drinks finished and the complainant went to sleep before Matia. The witness had also gone to sleep she does not know what happened after she went to sleep.
131. Dr. Mousheem Khan had examined the complainant. There was no sign of any forceful penetration seen on the complainant's body. Based on his medical findings he couldn't find anything on the patient that would have indicated that something forceful had happened to the complainant. Medically, he could not say that the patient was sexually abused.
132. The defence says the allegations raised by the complainant are lies and a made up story. The defence is asking this court to look at the evidence objectively. The allegations raised by the complainant did not happen.
133. The complainant had the opportunity to shout or yell or push the accused away from on top of her yet she did not do so. The defence is asking this court not to believe the complainant and the two prosecution witnesses.

DETERMINATION

134. 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.

135. After carefully considering the evidence adduced by the prosecution and the defence, I do not accept the evidence of the complainant to the extent that the accused had penetrated her vagina with his finger as truthful and reliable. From the outset the complainant after realizing that the accused was on top of her was struggling to either shout or push the accused from on top of her.
136. Considering the struggle and the resistance showed by the complainant if the accused had penetrated her vagina with his finger the complainant would have most certainly suffered injuries in the vaginal region. In this regard, I accept the evidence of Dr. Khan that any forced penetration of the vagina as described by the complainant would have sustained some kind of injuries in the vaginal region or the soft tissues.
137. I have also directed my mind to the fact that generally a female can be raped without any visible injuries on the body or the vaginal region, however, the evidence here is about continuous and /or persistent struggle by the complainant hence as the doctor had stated there ought to have been some kind of injuries suffered by the complainant but this was not so in this case.
138. However, there is evidence in respect of the lesser offence of sexual assault. The following elements of the offence of sexual assault have been kept in mind which must be proved by the prosecution beyond reasonable doubt:
- (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant by touching her vagina.
139. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.

140. 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.
141. The final element of assault is the unlawful use of force on the complainant by touching her vagina.

The following is kept in mind:

- (a) whether the force which was used in touching the complainant’s vagina by moving the complainant’s shorts and panty aside was 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.
142. 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 of the offence of sexual assault. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences of sexual assault, then this court must find the accused not guilty.
143. I accept the evidence of the complainant that the accused had touched her vagina by moving aside her shorts and panty. She gave a comprehensive and consistent account of what the accused had done to her in this regard and I accept her narration as truthful and reliable.
144. The complainant told Masilini immediately after this incident about what the accused had done to her. It is to be noted that the distressed state of the complainant was seen by Masilini and Rositalei when she left the bedroom. Although the complainant did not tell everything in detail to

Masilini about what the accused had done to her this was a natural response of a distressed complainant.

145. I accept that the complainant had relayed to Masilini crucial information about what the accused had done to her. This in my view was enough to alert Masilini that the accused had done something to the complainant.
146. I accept the evidence of Masilini about what she had seen in the bedroom particularly it was the accused and no one else who was on top of the complainant blocking her mouth and pressing her thigh as an honest and truthful account of what she had seen. I also accept that the accused had asked Masilini not to tell anything to his girlfriend Taraivini and had apologized to Masilini for his behaviour towards the complainant during discussions in the afternoon of the 29th. I also accept that Taraivini and the complainant were present during the discussions. Rositalei had also seen the distressed state of the complainant which is believable.
147. In respect of the touching of the complainant's buttocks on the 29th I believe the complainant and accept her evidence that the accused had touched her buttocks when she was going in to the house after brushing her teeth. The complainant was consistent in her evidence and also she told Masilini and Rositalei immediately of this incident about what the accused had done to her.
148. The complainant was steadfast in what she had encountered during the night of the 28th and early morning of the 29th. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty.
149. It is also noteworthy that the complainant had promptly told Masilini about the night incident and about the early morning incident to both Masilini and Rositalei and also promptly reported the matter to the police.

In fact the complainant and Masilini had immediately after the first incident started calling the police but their call could not get connected.

150. The complainant was also able to withstand cross examination and was not discredited as to the main version of both her allegations. I also accept the evidence of Rositalei that during the incidents Taraivini was not in the flat but had left for Sabeto on the 28th before the incident and came back into the flat in the afternoon of the 29th. The defence did not challenge this aspect of the evidence.
151. In my judgment all the prosecution witnesses told the truth in court and their evidence can be relied upon and none of these witnesses were discredited. Although there was an inconsistency between what the complainant and Masilini told the court in their evidence with what they had stated in their evidence. The inconsistencies were not significant to adversely affect their credibility. The inconsistencies were not substantial and it did not shake the core evidence of these witnesses.
152. 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 not. The fact that the complainant did not shout or yell or push the accused away in the circumstances of this case does not mean that she was consenting to the forceful acts of the accused.
153. The Court of Appeal made a pertinent observation in respect of the above in *Joseph Abourizk vs. The State, AAU 0054 of 2016 (7 June, 2019)* at paragraph 107 in the following words about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made the Indian Supreme Court in *State of UP v. MK Anthony (1985) 1 SCC 505*:

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have

a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...'

154. In this case, the circumstances were such that the complainant could not do anything to shout or yell because the accused was on top of the complainant and that he had blocked her mouth in order to stop her from shouting. Furthermore, the complainant did explain that although she was struggling with the accused she could not do much because the accused was strong and heavy. The accused accepted this aspect in his cross examination as well.
155. I also observed that the complainant had a strong view against the conduct of the accused on her and she had expressed clearly that she did not consent to what the accused had done to her on the two occasions mentioned by her.
156. The accused told the court that he had a good relationship with the complainant and the defence did not raise any motivation on the complainant to falsely implicate him. There was no evidence of any enmity between the two as well.
157. The complainant had promptly told Masilini about what the accused had done to her although not in complete detail does not affect the credibility of the complainant. It is not expected that a complainant will immediately tell every detail about an unexpected sexual encounter to the first person seen. In respect of the second allegation the complainant told Masilini

and Rositalei about what the accused had done to her within minutes of the incident. I find the complainant was consistent in her conduct.

158. Despite vigorous cross examination the complainant was not shaken as to the basic version of her allegations. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) had made the following pertinent observations about the above at paragraph 16 as follows:

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

159. On the other hand, the accused did not tell the truth he gave a version of events which is not tenable or plausible on the totality of the evidence. The accused did not tell the truth when he said he only went in to the bedroom to wake Matia. If this was the case there was no need for him to close the bedroom door when he went inside.
160. The defence contention that it was not the accused but Masilini’s brother Matia on top of the complainant is irrational. The accused in his evidence did not mention anything about this aspect at all. The accused stated that

he was in the bedroom and during cross examination had said he was lying beside the complainant when Masilini entered into the bedroom.

161. The complainant also clearly recognized the accused who did not dispute his presence in the bedroom at the time. In view of the above admission by the accused, Taraivini cannot be believed that at no time the accused had entered the complainant's bedroom and was at all times with her.
162. Taraivini did not to tell the truth when she said she had returned at about 11pm from Sabeto and nothing had happened because the accused was with her at all times. This witness also contradicted the accused as to who went to sleep at what time. The accused said at around 10 pm the complainant went to sleep and at around 9 pm Matia had gone to sleep. Taraivini said the complainant went to sleep late in the night and Matia went to sleep during the early hours of the morning at around 3 am.
163. It is to be noted that what Taraivini told the court was not in compliance with the rule in *Brown vs. Dunn* since none of the prosecution witnesses were asked in cross examination by defence counsel as to the whereabouts of Taraivini during the night of the 28th. Masilini and Rositalei had said that Taraivini had left for Sabeto after work on the 28th and returned to the flat the next day 29th after work.
164. During cross examination of Masilini and Rositalei the defence did not challenge the evidence of these witnesses that Taraivini was not in the flat during the time of both allegations. It was obvious to me that Taraivini was protecting the accused in fact she admitted this in her cross examination. I do not give any weight to her evidence. This also applies to the evidence of Sainiana.

165. The defence did not cross examine the prosecution witnesses about Sainiana's presence in the bedroom. It was therefore undisputed that it was only the complainant and Matia in the bedroom.
166. This witness did not take the defence case any further. She was bringing into evidence the presence of Taraivini during the night of the 28th in the flat. This witness also did not tell the truth and I give no weight to the evidence of this witness as well.
167. The defence has not been able to create a reasonable doubt in the prosecution case in respect of the offence of sexual assault and indecent assault.


CONCLUSION

168. This court is not satisfied beyond reasonable doubt that the accused on 28th October, 2019 had penetrated the vagina of the complainant with his fingers without her consent. However, this court is satisfied beyond reasonable doubt that the accused on 28th October, 2019 had unlawfully and indecently assaulted the complainant after moving her shorts and panty aside and touching her vagina.
169. This court is satisfied beyond reasonable doubt that the accused on 29th October, 2019 had unlawfully and indecently assaulted the complainant by touching her buttocks.
170. In respect of the above offences the accused acted unlawfully that is without lawful excuse and indecently 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 and indecent in

nature. Finally, the complainant did not consent to the above mentioned acts of the accused.

171. In view of the above, I acquit the accused of the offence of rape as charged but find him guilty of the lesser offence of sexual assault and one count indecent assault as charged. The accused is convicted accordingly.

172. This is the judgment of the court.


Sunil Sharma
Judge



At Lautoka

25th July, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Maisamoa and Associates for the Accused.