

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 204 of 2018**

**STATE**

**V**

**JAMES ANTHONY NAIDU**

**Counsel** : Mr. Alvin Singh with Ms. Sheenal Swastika for the State  
Ms. Anishini Chand with Ms. Christine Mariam for the Accused

**Dates of Trial** : 29 & 30 June and 1 July 2022

**Closing Submissions** : 13 July 2022

**Judgment** : 3 August 2022

*The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "DD".*

## **JUDGMENT**

[1] As per the Amended Information filed by the Director of Public Prosecutions (DPP), the accused above-named is charged with the following offences:

### **FIRST COUNT**

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

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

***Particulars of Offence***

**JAMES ANTHONY NAIDU**, between the 1<sup>st</sup> day of July 2014 and 31<sup>st</sup> day of July 2014, at Lautoka, in the Western Division, penetrated the mouth of **DD**, with his penis, without her consent.

**SECOND COUNT**

***Statement of Offence***

**INDECENT ASSAULT**: Contrary to Section 212 (1) of the Crimes Act.

***Particulars of Offence***

**JAMES ANTHONY NAIDU**, between the 1<sup>st</sup> day of July 2014 and 31<sup>st</sup> day of July 2014, at Lautoka, in the Western Division, unlawfully and indecently assaulted **DD**.

- [2] The accused pleaded not guilty to the two charges and the ensuing trial was held over 3 days. Thereafter, the Learned Counsel for the Defence and State made their closing submissions.

**The Burden of Proof and the Standard of Proof**

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

*(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*

*(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

*(3) In this Decree (Act)—*

*"legal burden", in relation to a matter, means the burden of proving the existence of the matter.*

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

## Legal Provisions and the Elements of the Offences

[5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (c) of the Crimes Act; and one count of Indecent Assault, contrary to Section 212 (1) of the Crimes Act.

[6] The first count against the accused is a charge of Rape, contrary to Section 207 (1) and (2) (c) of the Crimes Act.

[7] Section 207(1) of the Crimes Act reads as follows:

*207. — (1) Any person who rapes another person commits an indictable offence.*

[8] Section 207(2) of the Crimes Act is reproduced below:

*(2) A person rapes another person if —*

*(a) the person has carnal knowledge with or of the other person without the other person's consent; or*

*(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*

*(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

[9] Section 207 (2) (c) makes reference to a person penetrating the mouth of the other person, to any extent, with his penis, without the other person's consent.

[10] Therefore, in order to prove the first count of Rape against the accused, the prosecution, must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this instance between the 1 July 2014 and 31 July 2014);
- (iii) At Lautoka, in the Western Division;
- (iv) Penetrated the mouth of the complainant DD, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

- [11] To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offence.
- [12] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [13] The fourth element involves the penetration of the complainant's mouth, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the mouth of the complainant with his penis to any extent.
- [14] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's mouth, with his penis, without her consent.
- [15] It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:
- (a) by force; or
  - (b) by threat or intimidation; or
  - (c) by fear of bodily harm; or
  - (d) by exercise of authority; or
  - (e) by false and fraudulent representations about the nature or purpose of the act; or
  - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[16] Apart from proving that the complainant did not consent for the accused to penetrate her mouth with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[17] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 19 years at the time of the alleged incident, and therefore, she had the mental capacity to give consent. [Her date of birth being 1 May 1995].

[18] The second count against the accused is a charge of Indecent Assault, contrary to Section 212 (1) of the Crimes Act. The offence of Indecent Assault is defined in Section 212 (1) of the Crimes Act as follows:

*(1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.*

[19] Therefore, in order to prove the second count of Indecent Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this instance between the 1 July 2014 and 31 July 2014);
- (iii) At Lautoka, in the Western Division;
- (iv) Unlawfully and indecently assaulted DD, the complainant.

[20] To further elaborate upon these elements in relation to second count. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[21] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[22] The accused would be guilty of Indecent Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for Court to consider and decide whether the fondling of the complainant’s breasts by the accused with his hands, is an indecent act and thereby amounts to Indecent Assault.

### **Case for the Prosecution**

[23] The prosecution, in support of their case, called the complainant (DD), who was their sole witness.

### **[24] Evidence of the complainant DD**

- (i) *The complainant’s evidence was recorded over a period of 2 days. Her evidence was recorded in a ‘closed court’.*
- (ii) *The complainant testified that she is currently 27 years old. She said that her date of birth is 1 May 2005. She is currently residing at Naikabula.*
- (iii) *The witness said that she has studied up to form 6 at Jasper Williams High School. She said she went to University of South Pacific (USP), but did not finish her course of studies there.*
- (iv) *The witness testified that in the year 2014, she was staying in Ram Asre Road, Lautoka with her mother. She has five siblings, all sisters. (Including her it is six). She is the third eldest in the family.*
- (v) *The complainant said that during the weekends she used to go and stay at her friend Aggie’s place, in Balawa.*
- (vi) *The witness testified to the events which took place on a day in July 2014. She said: “It was a Saturday. I was at Balawa with my friend Aggie and some other friends. We were headed to town-waiting for transport to go to town. James happened to drive by. So he gave us a lift-me and my friends”.*
- (vii) *She said James was seated in Court. His full name is James Naidu. She knows him because he was their neighbour at Ram Asre. He was also like a family friend to them. Back in 2014 she had known James for 2 or 3 years.*
- (viii) *The complainant continued that James also stayed at Ram Asre. “He lived down the road, we lived at the roundabout. About 2 or 3 blocks apart”.*
- (ix) *The complainant identified James as the accused in the dock.*
- (x) *She said that Aggie was her best friend in High School and she was a far cousin, related to her through marriage from her step-mum.*

- (xi) *The witness said that on that day there were six friends (including herself). She didn't recall all their names. She said: "They were my friends and Aggie's friends".*
- (xii) *She said the time was close to 9.00 – 10.00 in the morning. They had been waiting for transport to take them to town. While they were waiting, the accused James drove by and he had offered them a lift to town. She and her friends took the offer to go in his car. From that place to town it was 5 to 7 minutes. The accused had dropped them off at Lautoka town.*
- (xiii) *The witness testified while travelling in the car, James had invited her and her friends for drinks that evening. She said: "He had invited me and my friends for drinks that evening-he invited us to meet up at Simla grounds later in the evening-at 8.00 p.m". She said that she and her friends had accepted the invitation.*
- (xiv) *The witness then testified to the events which took place in the evening of that day. She said she and her friends went by cab to Simla Park. It was the six of them-the same six friends who travelled in the accused's vehicle that morning. They had reached Simla Park around 8.00 in the evening. It had been dark at the time. After arriving at the park, they had been seated on the ground and waited for the accused-she cannot recall exactly how long they waited for. She said, maybe half an hour, maybe 1 hour.*
- (xv) *Later James had arrived in a grey coloured probox vehicle. He had parked the car, got out of the car and come towards them.*
- (xvi) *Thereafter, the accused had said that he is going to get the drinks and for the complainant to accompany him. So she and the accused went towards his car. He had told the complainant to sit in the front seat and she had done so. Besides herself and the accused, there was no one else in the vehicle. The time was around 9.00 p.m.*
- (xvii) *When asked why she had gone with the accused, the complainant said that she did so because she trusted him. When asked why she didn't ask Aggie to accompany her, the witness said: "Because I didn't know anything would happen to me..... My other friends were seated because he said we were going to get the drinks".*
- (xviii) *The complainant said she didn't know where they were going to get the drinks from. All the windows in the car were up and the air condition had been on.*
- (xix) *The witness said that on that day she was wearing a dress with a strap. She couldn't recall the colour of the dress or whether it was long dress or a short dress. Inside the dress she was wearing her bra.*
- (xx) *The following questions were then asked from the witness and she answered as follows:*

Q. *What happened after that?*

A. *He was driving towards Savala Street. He told me he was going to buy the alcohol there.*

- Q. *Did he say at what particular place?*  
A. *No.*
- Q. *What happened after that?*  
A. *We went into Savala Street. He parked the car on the side of the road. It was dark. There was no street lights there. The doors were already locked. He told me either I suck him or he will fuck me.*
- Q. *When he uttered those words, what was your reaction?*  
A. *I couldn't fight back. I was scared.*
- Q. *How did you know the doors were locked?*  
A. *When I got in the car, he locked the doors. I did not bother because I trusted him.*
- Q. *How did he lock the doors?*  
A. *Central lock (central locking).*
- Q. *What do you mean by, I couldn't fight back?*  
A. *I could have run. It was dark. I was helpless.*
- Q. *What happened after that?*  
A. *He pulled his  $\frac{3}{4}$  pants down. He put his hands in my breast (the witness demonstrated as to how this happened). He was squeezing it. While he was squeezing the breast with one hand, with the other hand he grabbed my hair. Then he pushed it towards his penis. I was crying. He ejected in my mouth. Water from his penis came. He ejaculated.*
- Q. *After he grabbed your hair and pushed it towards his penis, what happened?*  
A. *One hand was on my breast-he was squeezing my breast. He put my mouth inside his penis. He put his penis inside my mouth.*
- Q. *For how long did he do that?*  
A. *3 minutes. Close to 3 minutes. I can't recall.*
- Q. *When did he stop?*  
A. *When he ejaculated. I put my head up and went back to the seat.*
- Q. *Where did he ejaculate?*  
A. *Into my mouth.*
- Q. *When he stopped, what did you do?*



A. *I was crying. I wiped my mouth.*

Q. *How did you wipe your mouth?*

A. *With my hand.*

Q. *After that, what did you do?*

A. *I sat back. I was just crying.*

Q. *What was the accused doing?*

A. *I didn't even want to look at him.*

(xxi) *When asked whether at the place where the car was parked whether there were any houses close by, the witness said there were houses but it was dark. She couldn't recall where was nearest house. There were no people around as it was dark.*

(xxii) *The witness was asked that she had the opportunity to shout and whether she did so. The witness answered: "I should have shouted but no I was scared".*

(xxiii) *The witness was asked as to how she felt when the accused was doing all those things to her. She said that she was embarrassed and scared.*

(xxiv) *The witness testified that thereafter, the accused had driven the car and went somewhere but she had not bothered. He went to get the alcohol. She doesn't recall how far that place was from the place of the alleged incident. But it was a short drive.*

(xxv) *It was queried from the witness that at that point in time (the place where the accused went to get alcohol) she had the opportunity to exit the car, and whether she did so? The witness said that she was scared.*

(xxvi) *The complainant said that after picking up the alcohol (a bottle of Jim Beam), they had gone back to Simla Park where her friends Aggie and they were. It was a short drive.*

(xxvii) *On the way back to Simla Park the accused had given her money. He had pushed the money into her hand. She cannot recall as to how much it was or as to why the accused had given her the money. She cannot even recall whether she had taken the money.*

(xxviii) *On arriving at Simla Park, Aggie and her friends were there. The same friends who were there when she left with the accused in his car. She and the accused had both got down from the car and gone towards where Aggie and her friends were and sat down. The witness said: "He came and sat with us. He was holding the bottle. He put it on the ground. He told my friends the alcohol is there. He sat there for a while. And he went".*

(xxix) *The complainant said that she did not tell Aggie about what happened to her because she was embarrassed and scared. That night she had gone to Aggie's place. She had gone to her home on the following day-which was a Sunday.*

- (xxx) The complainant said that on arriving home, she did not tell any of her family members about what the accused did to her because she was embarrassed.
- (xxxii) When asked as to when she actually informed her family about the incident, the witness said: "When my younger sister was there, my mum was there. She told my mum that James assaulted her too. Then my mum called the Police. Then I told my mum and my sister the same thing he did to me too. He assaulted me too". The witness said that this was in the early part of 2015.
- (xxxiii) The complainant was asked as to what made her report the matter, after initially saying that she was embarrassed and scared. She answered as follows: "I reported it because if he did it to others. He did it to my sister. And he did it to me. Who else will he do it to?"
- (xxxiv) The complainant said that this incident had affected her emotionally and physically.
- (xxxv) She said she is now married and has a child who will be 6 years in August this year.
- (xxxvi) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant, totally denying that any of the incidents, as alleged by the complainant, took place on a day in July 2014 as testified to by her.
- (xxxvii) The witness was questioned about the statement she made to the police, on 14 May 2015, which was nearly 10 months after the alleged incident. Furthermore, she agreed that she had made a second statement to the police on 8 June 2016. The witness said that this was after Cyclone Winston in 2016.
- (xxxviii) The complainant was asked as to whether she knew as to who had crossed out the year 2014 and instead added 2015, in the 2<sup>nd</sup> line of her statement dated 14 May 2015. She said she didn't know as to who had done so. When asked if the initial at the point of correction was hers, she said no. The complainant said she uses the initials DD.
- (xxxix) The Defence highlighted the following inconsistencies in the testimony given in Court by the complainant, vis a vis the statement made by her to the police on 14 May 2015:

- i. In her testimony in Court, the witness said that she had been residing at Ram Asre Street for about 8 years.

However, in her statement made to the Police, it is recorded as follows:

"I have been residing at the above-mentioned address for the last five years".

The complainant maintained that she was not good at mathematics. She said she can't calculate backwards.

- ii. *In her testimony in Court, the witness said that on that Saturday morning there were six friends (including herself), waiting for transport to take them to town.*

*However, in her statement made to the Police, it is recorded as follows:*

*“It was one Saturday while I was with Aggie and her friend waiting for the transport to come to town”.*

- iii. *In her testimony in Court, the witness said that the accused had parked the vehicle on the side of the road somewhere in Waiyavi.*

*However, in her statement made to the Police, it is recorded as follows:*

*“He stopped the car at one house”.*

*(xxxix) The Defence highlighted the following omissions in the complainant’s statement made to the Police on 14 May 2015, in comparison to the testimony given by her in Court:*

- i. *That there is no mention in the statement that she and her friends (the six of them) had attended a function in town prior to coming to Simla Park that evening.*
- ii. *That there is no mention in the statement that James had ejaculated in her mouth nor is there any mention in the statement that James had ejaculated at all.*

*(xl) The witness confirmed that she was living in Ram Asre Street with her mother and 4 other sisters. Her elder sister was married (and was living separately). She agreed that her mother was very loving and caring towards her and that she loved her four sisters dearly.*

*(xli) She was asked as to how many times she had visited the accused’s house. The complainant said: “We don’t visit him. But we know him. Because when my family comes from overseas, they used to use his rental vehicles. Some of his workers used to come and do joinery work/fix the cupboards that’s how we know him. He had one son at that time”.*

*(xlii) The witness denied that James or any member of his family had spent the night at her house. She also denied that any of her immediate family members had spent the night at James house, at any point of time.*

- (xliii) When asked whether she has attended any parties or social gatherings at James' house the complainant said she cannot recall. Similarly, she said that James had never attended any parties or any gatherings at her house. She said: "Only if there is problems with the rental. Then he comes up".
- (xliv) It was suggested to the complainant that James was not a family friend but rather an acquaintance. She said that James was a family friend through her aunt and that her aunt is family. She further said: "This is Fiji. Everybody if friends of your family, they will be your friends". She re-iterated that James was a family friend.
- (xlv) It was suggested to the complainant that once in the year 2014 she had accompanied James' son Brendon (who is usually residing overseas) to his house at Ram Asre Road. It was further suggested that on that day she had arrived there intoxicated and was lying on their sofa. It was also suggested that the accused's wife had chased her out of their house on that particular day and that she has made up these allegations against the accused because she was chased out of his house. The complainant categorically denied these suggestions.
- (xlvi) The complainant was questioned about the second statement made by her to the police on 8 June 2016. There she has stated that she was residing at Naikabula with her husband for the past 1 year and 3 months, which would mean that she has been staying at Naikabula since 8 March 2015. The complainant denied this position.
- (xlvii) The witness was questioned as to why she could not remember the names of the four friends (other than for Aggie), she had been with on that particular day in July 2014. It was suggested to her that the reason she cannot remember the names of the four friends was because this incident did not happen. The witness answered: "How can I remember their names when I met them that day".
- (xlviii) It was suggested to the complainant that the accused never owned or drove a probox vehicle. It was also suggested that the accused did not own any grey coloured vehicle. The witness said, on that night the accused came in a probox vehicle and that it was grey colour.
- (xlix) It was suggested to the complainant that it would have taken sometime for the accused to pull down his  $\frac{3}{4}$  pants since he was in a sitting position. The witness disagreed. It was further suggested to the complainant that whilst the accused was pulling down his  $\frac{3}{4}$  pants, that she could have opened the door and escaped and that she made no efforts or attempts to try and escape. The complainant said that it was dark and she was scared.
- (l) The witness agreed that from Savala Place they had left to somewhere in Waiyavi. She was questioned as to how the accused had received the bottle of Jim Beam at Waiyavi. She said: "I don't know, I didn't even want to see his face". The witness continued: "When I got off the car at Simla Park, he was holding the bottle. That's all I can recall".

- (li) *It was suggested to the witness that whilst travelling from Savala Place to Waiyavi, she could have tooted the horn of the vehicle or waved to other vehicles to raise an alarm. She said it was night and it was dark.*
- (lii) *It was further suggested that when the accused had parked his vehicle at the side of the road in Waiyavi, that she had an opportunity to shout or seek help. She said she was scared.*
- (liii) *The complainant was asked the question: "You want us to believe that you stayed back with your friends and partied after an alleged incident of rape?" The witness answered: "I didn't party but I was there with them. From there we went to Aggie's place, spent the night and Sunday I went home".*
- (liv) *The complainant said that for 10 months she did not tell Aggie or the other four friends at Simla Park or anyone else as to what the accused did to her. She explained that she was scared and embarrassed to do so. She said she was scared of society and how they will describe what happened to her.*
- (lv) *It was suggested to the complainant that she has framed the accused with this rape allegation because she was chased out of the accused's house by his wife and when she found out about certain complaints from her younger sister she used it as an opportunity to concoct her own false story to exact revenge. The complainant answered: "Why should I frame him when James raped me. Why?"*
- (lvi) *The complainant was questioned in detail the reason for making a second statement to the Police in June 2016. She explained that the reason she did so was because she had signed three papers stating that what James did to her is not true. She said she was forced to sign these papers by her father. "He is a strict man-so whatever he tells us to do, we listen". She explained further that her father had told her and her sister to sign the papers that James didn't rape them. These papers were signed at Lawyer Nacolawa's Office. However, the witness could not recall when these papers were signed.*
- (lvii) *In addition to the above, the witness said that a person was calling her on her mobile phone offering her money to close the case. She does not recall when this was or how long after reporting the matter.*
- (lviii) *Therefore, the purpose of the complaint made to the Police in June 2016 was to state the above matters and to confirm what the accused did to her was true.*
- (lix) *It was suggested to the witness that she did not report the matter to the Police for about 2 months after her father had forced her to withdraw the complaint against the accused. The witness said that was correct.*
- (lx) *The Defence also highlighted the following omission in the complainant's statement made to the Police on 8 June 2016, in comparison to the testimony given by her in Court:*

*That there is no mention in the statement that both she and her younger sister had been forced by her father to sign the papers at the*

*Lawyers Office, stating that what James did was not true. There is only mention that the complainant had signed the papers.*

*(lxi) The following further questions were asked from the witness in cross-examination and she answered as follows:*

*Q. I suggest to you that you have framed James Anthony Naidu?*

*A. I didn't frame him.*

*Q. I further suggest to you that James never invited you to any drinking party?*

*A. He invited me.*

*Q. I suggest to you that James never came to Simla Park or anywhere to pick you up?*

*A. He came to Simla Park.*

*Q. I further suggest to you that he never took you to Savala Place?*

*A. He took me to Savala Place.*

*Q. I suggest to you that he never confined you in his vehicle?*

*A. He kept me in the car/he confined me.*

*Q. I suggest to you that you have not been able to recall significant details of the offending as well as events happening before and after the offending, because the incident did not happen?*

*A. The incident happened.*

*Q. I suggest to you that James Anthony Naidu did not penetrate your mouth with his penis at any point in time nor did he indecently or unlawfully assault you at any point in time?*

*A. He did.*

*(lxii) In re-examination, the witness was asked certain clarifications regarding the three letters she had been forced to sign by her father at the lawyer's office and also about the telephone call she had received offering her money to withdraw or close this case against the accused.*

*(lxiii) It must be mentioned, that during the course of the complainant's evidence, she was seen crying on several occasions. Thus, Court had to adjourn sittings on a few occasions to enable the complainant to compose herself. Court also observed that on certain occasions the complainant was breathing out loud. For these reasons, during the course of the cross-examination, Court ordered*

*that a screen be placed in front of the accused so that the complainant will not see him face to face.*

- [25] At the end of the prosecution case Court decided to call for the defence of the accused. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.
- [26] The accused decided to testify on his own behalf. He also called one other witness in support of his case- Suluia Lotita (His de-facto partner).

### **Case for the Defence**

#### **[27] Evidence of James Anthony Naidu**

- (i) *The witness testified that he is 61 years old. He is a Registered Forensic Psychiatric Nurse. His residential address is 23, Thompson Crescent, Simla.*
- (ii) *The witness said that he is in a de-facto relationship since 2010. His de-facto partner's name is Suluia Lotita. He has two children in Fiji. He has a total of four children. The eldest is Brendon Anthony Naidu (32 years). His other children are James Christopher Naidu (30 years), Jayjay Naidu (10 years) and James Anthony Naidu (7 years).*
- (iii) *The witness said that in 1983 he graduated as a Nurse from Tamavua Nursing School. His first posting was at Labasa Hospital where he had worked for 2 years. He had worked at CWM Hospital from end of 1984 to early 1989. He had then got married and migrated to New Zealand.*
- (iv) *He had pursued his career in New Zealand after getting a scholarship from the New Zealand Government-scholarship to study at Auckland University for 2 years. He had obtained a Diploma in Forensic Psychiatry.*
- (v) *He had worked as a Civil Servant in New Zealand from that time until 2011 when he had resigned.*
- (vi) *Since the present government had offered dual citizenship to those wanting to start a business, he had come to Fiji in 2011 and started his own business here in Fiji. He still has dual citizenship.*
- (vii) *He has a motel, some shops and some industrial properties, residential properties and rental car business.*
- (viii) *The witness totally denied the allegations made against him by the complainant. He said those allegations are absolutely untruthful.*

- (ix) *He testified that he came to know the complainant sometime in the month of September 2014, when his son Brendon was holidaying in Fiji. Early hours in the morning one day, he had heard noises in the kitchen area. He said that noise was very unusual to him. He could hear the noise of pots and plates. So he got out of bed and went to inquire. [Although not specifically clarified from the witness, this would have been when he was residing at Ram Asre Road].*
- (x) *The witness said: "I saw my son in the kitchen. Then I saw this girl lying down on a couch in the lounge area". He had asked his son Brendon who that was. Brendon had told him it was DD.*
- (xi) *The witness said by that time, his wife had also come to the lounge area from the bedroom where she was sleeping. "And then we went closer to her and we could smell alcohol and heavy smoke coming out. Then my wife woke her up and chased her out of the house".*
- (xii) *The witness testified that he found out the name of the complainant only that day.*
- (xiii) *The witness said that he has never owned or driven a probox vehicle. He has also never owned a grey coloured vehicle.*
- (xiv) *The witness denied that he gave the complainant and her five friends a lift from Balawa to Lautoka town. He denied having invited the complainant and her five friends for a drink sometime in July 2014. He further denied that he took the complainant in a vehicle from Simla Park to Savala Place to rape and to indecently assault her in July 2014. He further denied that he took the complainant to Waiyavi to buy alcohol in the month of July 2014.*
- (xv) *When asked why he thinks the complainant has made these allegations against him, the witness said: "To my understanding, I have a great feeling that she was very upset that I disapproved my son having a relationship with her. I had to cut his trip short and I had to send him back".*
- (xvi) *When asked why he did not want his son to associate with her, the witness said: "As I told earlier, I always used to see them on the road drunk and doing things which were not my way of living-smoking, drinking and moving around. The way they did things was not my style of life. That's why I disapproved my son.*
- (xvii) *The witness said that during his Police interview, he had been advised by his lawyer to remain silent. "He told me, whatever you want to say, you can say it in Court. Therefore, I chose that option".*
- (xviii) *The witness was cross-examined at length by the Learned Counsel for the State and the Prosecution version of the events was suggested to him.*

**[28] Evidence of Suluia Lotita**

- (i) *The witness testified that she is 34 years old. She is currently residing at 23, Thompson Crescent, Simla. She is doing domestic duties.*
- (ii) *The witness testified that she is in a de-facto relationship with James Naidu, since 2010.*



- (iii) *When asked whether she knows the complainant DD, she said not personally. The complainant had come home one time around September 2014. She came with James' son Brendon.*
- (iv) *The witness said: "I woke up when I heard James talking to Brendon. I heard the noise from the kitchen. That's when I got out of bed and went to the kitchen. That's when I saw her sitting in the couch of our living room". The witness said it was around 5.00 in the morning.*
- (v) *When asked what happened thereafter, the witness said: "I recalled that she was a girl who used to walk up and down our street. I can smell alcohol. That's when I got angry and chased her out of the house".*
- (vi) *The Court had asked the witness whether she knew what James and Brendon were talking about in the kitchen. The witness answered: "He was angry-not really angry but talking in a dad's tone. He was telling Brendon about his drinking and that he should choose his friends wisely since he is now in Fiji".*
- (vii) *In cross-examination the witness confirmed that this incident happened when she was staying with the accused at Ram Asre Road. She had been living there since September 2013. They had moved to their new house in Thompson Crescent in February 2015.*
- (viii) *In cross-examination the witness said that the complainant was lying down on the couch. Later she explained that the complainant was sitting and knocked out.*
- (ix) *It was suggested to the witness that this story that she was telling Court had been discussed with the accused. The witness denied and said she is testifying to what she saw.*
- (x) *It was suggested to the witness that this story about she chasing the complainant out of their house in September 2014, is an absolute lie. The witness denied this suggestion and said: "How can it be a lie when I was there myself".*
- (xi) *It was also suggested to the witness that the only reason she was trying to say this false story was to save her husband. The witness denied this suggestion.*

### **Analysis**

**[29]** As stated before, the prosecution, in support of their case, called the complainant (DD), who was their sole witness. The accused testified on his own behalf and called one other witness- his de-facto partner-in support of his case.

**[30]** The burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove all the elements of the two charges of Rape and Indecent Assault beyond reasonable doubt.

- [31] In respect of the first count of Rape, the prosecution must establish beyond a reasonable doubt that the accused, between the 1 July 2014 and 31 July 2014, at Lautoka, penetrated the mouth of the complainant, with his penis, without the consent of the complainant and that the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting. I have already made reference to the said elements that the prosecution has to prove in paragraph 10 of this judgment.
- [32] In respect of the second count of Indecent Assault, the prosecution must establish beyond a reasonable doubt that the accused, between the 1 July 2014 and 31 July 2014, at Lautoka, unlawfully and indecently assaulted the complainant, by fondling of her breasts, with his hands. I have already made reference to the said elements that the prosecution has to prove in paragraph 19 of this judgment.
- [33] I have summarized the evidence of all witnesses led during the trial.
- [34] The complainant testified as to how the accused had taken her from Simla Park to Savala Place in his vehicle, one night, in the month of July 2014. He had parked the car on the side of the road. At the time, all the windows in the vehicle were up and the doors were locked. The accused had pulled his ¾ pants down. He had put his hands in the complainant's breast and was squeezing it. While he was squeezing the breast with one hand, with the other hand he grabbed her hair. Then he pushed it towards his penis and inserted his penis in her mouth. The witness was crying. The accused had ejaculated inside her mouth.
- [35] The accused has testified in Court and totally denies all the allegations made against him by the complainant. His de-facto partner testified in support of his case.
- [36] The defence position is that the complainant has framed the accused with these allegations because she was chased out of the accused's house by his wife one morning, in September 2014, as she found the complainant intoxicated and sitting/lying in the couch of their living room.
- [37] With reference to this evidence, no clarification was made by either the accused or his de-facto wife as to how the complainant had reacted when she was asked to leave their house. Did she comply and leave immediately at 5.00 in the morning or did she refuse

to comply? Was the accused's son Brendon, who would have been instrumental in bringing the complainant to the house, consulted prior to the complainant been asked to leave? It is to be noted that at the time, Brendon would have been 24 years of age (as he is said to be 32 years of age now).

**[38]** This proposition was put to the complainant and she vehemently denied that any such thing happened.

**[39]** Another position taken up by the defence is that the complainant was very upset that the accused had disapproved of his son Brendon having a relationship with her. However, this proposition was not put to the complainant during her testimony so as to ascertain her response in regard to the matter.

**[40]** If Court is to further analyse the first proposition taken up by the defence that the complainant has framed the accused with these allegations because she was chased out of the accused's house by his wife. Since it is the accused's wife who is said to have chased her away, why then would the complainant want to exact revenge from the accused? Also why did the complainant wait for over 8 months (from September 2014 until May 2015), to make the complaint against the accused? If her intention was to take revenge against the accused, wouldn't she have complained against him immediately rather than waiting until May 2015?

**[41]** For the aforesaid reason, it is my opinion, that the defence version is not probable or reasonable and cannot be accepted as truthful and reliable. Therefore, I reject the defence version.

**[42]** The complainant testified at length as to how the accused had committed the alleged offences on her. At the time she testified in Court the complainant was 19 years of age. She said her date of birth was 1 May 1995.

**[43]** The Defence attempted to impeach the complainant's credibility during her cross examination by stating that the complainant did not complain of the incident for nearly 10 months.

**[44]** This Court is conscious of the fact that that victims of sexual offences react to the incident in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or embarrassment or fear or shock or

confusion, may not complain about the matter to anyone or go to the authorities for some time. There is, in other words, no classic or typical response by victims of sexual offences.

[45] However, the complainant explained that she did not complain of the matter to any family member or friend immediately as it took place because she was scared and embarrassed to do so. She said she was scared of society and how they will describe what happened to her. She finally decided to report the matter only when she found out from her younger sister that the accused had sexually abused her as well. The complainant said *"I reported it because if he did it to others. He did it to my sister. And he did it to me. Who else will he do it to?"*

[46] Court accepts the explanation provided by the complainant for the delayed reporting of the matter as reasonable. It must be borne in mind that a late complaint does not necessarily signify a false complaint; any more than an immediate complaint necessarily demonstrates a true complaint.

[47] The defence also attempted to impeach the complainant's credibility by highlighting a few inconsistencies and omissions in her statements made to the police on 14 May 2015 and 8 June 2016, in comparison to the testimony given by her in Court. I have identified and made reference to the the said inconsistencies and omissions when summarizing the complainant's evidence.

[48] I am of the opinion that the said inconsistencies and omissions are not significant and also not fundamental to the issues Court has to consider in determining this matter. As such, I am of the opinion that the reliability and credibility of the complainant's evidence is unaffected.

[49] The defence also attempted to impeach the complainant's credibility by highlighting the fact that she did not know the names of any of the four friends, other than for Aggie, who had been with her on that particular day in July 2014. The defence position was if the events of July 2014 had actually taken place the complainant should know the names of the said four persons. The complainant explained that the other four friends were in fact Aggie's friends and that she had met them only on that day. It is true that at one point during her testimony she said that those friends were her friends and

Aggie's friends. However, Court accepts the explanation provided by the complainant for now knowing the names of the four friends as reasonable.

[50] The defence further attempted to impeach the credibility of the complainant by stating that she had every opportunity of escaping from the accused's vehicle while at Savala Place and also at Waiyavi, but that she made no attempt to escape or to raise an alarm. However, the complainant has explained that it was night and it was dark at the time and that she was afraid. Court is conscious of the fact that at the time the complainant was confined in the accused's vehicle with the windows and doors all locked, and therefore, accepts the explanation provided by the complainant in this regard as probable and reasonable.

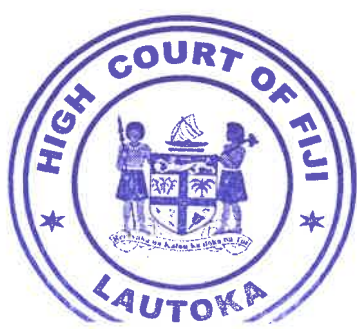
[51] Having analysed all the evidence in its totality, it is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable. The complainant withstood the rigorous cross examination by the Defence and remained consistent throughout her evidence, in relation to the material particulars of this case.


[52] It must also be mentioned that in terms of the provisions of Section 129 of the Criminal Procedure Act, "Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted".

[53] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charges of Rape and Indecent Assault with which the accused has been charged.

[54] In the circumstances, I find the accused guilty of the first count of Rape, and second count of Indecent Assault.

[55] Accordingly, I convict the accused of the first count of Rape, and second count of Indecent Assault.



  
Riyaz Hamza

**JUDGE**

**HIGH COURT OF FIJI**

AT LAUTOKA

Dated this 3<sup>rd</sup> Day of August 2022

**Solicitors for the State:       Office of the Director of Public Prosecutions, Lautoka.**

**Solicitors for the Accused:   Anishini Chand Lawyers, Barristers & Solicitors, Lautoka.**