

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 273 of 2022**

STATE

vs.

KAUSHIK KOSHAL SINGH

**Counsel:** Ms. W. Elo with Ms. S. Bibi for the State  
Ms. M. Singh with Ms. V. Kirti for the Accused

**Date of Hearing:** 03<sup>rd</sup> October 2022

**Date of Closing Submission:** 04<sup>th</sup> October 2022

**Date of Judgment:** 13<sup>th</sup> October 2022

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**JUDGMENT**

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1. The name of the Complainant is suppressed and referred to as 'AS'.
2. The Accused is charged with one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act 2009 and two counts of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act 2009. The particulars of the offences are:

**COUNT 1**

*(Representative Count)*

*Statement of Offence*

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

*Particulars of Offence*

**KAUSHIK KOSHAL SIGNH** between the 1<sup>st</sup> day of January 2020 and the 31<sup>st</sup> day of December 2020, at Tacirua, in the Eastern Division, unlawfully and indecently assaulted **AS** by touching her breasts and her vaginal area, over her clothing.

**COUNT 2**

*Statement of Offence*

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

*Particulars of Offence*

**KAUSHIK KOSHAL SINGH** between the 1<sup>st</sup> day of January 2021 and the 15<sup>th</sup> day of May 2021, at Tacirua, in the Eastern Division, had carnal knowledge of **AS** a child under the age of 13 years.

**COUNT 3**

*Statement of Offence*

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

*Particulars of Offence*

**KAUSHIK KOSHAL SINGH** between the 16<sup>th</sup> day of November 2021, at Tacirua, in the Eastern Division, had carnal knowledge of **AS** a child under the age of 13 years.

3. The Accused pleaded not guilty to these counts; hence, the matter proceeded to the hearing. The hearing commenced on the 3rd of October, 2022 and concluded on the same day. The Prosecution presented the evidence of the Complainant. At the end of the Prosecution's case, the learned Counsel for Defence made an application under Section 231 (1) of the Criminal Procedure Act, stating there was no evidence to establish the third Count as

charged in the Information. The learned Counsel for the Prosecution conceded to this Application. I accordingly found no evidence to establish the third Count of Rape as charged and dismissed the said Count while acquitting the Accused of the same. The trial then proceeded with one Count of Sexual Assault and one Count of Rape. The Accused opted to exercise his right to remain silent. However, he called his mother to give evidence for the Defence.

4. Subsequently, the Court heard the closing submissions of the parties. In addition to their oral submissions, both Counsel filed their respective written submissions. Having carefully considered the evidence adduced during the hearing and the respective oral and written submissions of the Prosecution and the Defence, I now pronounce the Judgment on this matter.

#### **Burden and Standard of Proof**

5. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

#### **Elements of the Offences**

6. The main elements of the offence of Sexual Assaults are that:
  - i) The Accused,
  - ii) Unlawfully and indecently,
  - iii) Assaulted the Complainant.
7. The main elements of Rape are that:
  - i) The Accused,

- ii) Penetrated the vagina of the Complainant with his penis,
  - iii) The Complainant was a child under the age of 13 years.
8. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the Accused who committed these offences against the Complainant.
9. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the Accused is sufficient to prove the element of penetration.

**Admitted Facts**

10. The Prosecution and the Defence admitted the following facts under Section 135 of the Criminal Procedure Act.
- 1. *Kaushik Koshal Singh (the Accused) is charged with 1 Count of Sexual Assault and 2 Counts of Rape.*
  - 2. *The Accused and AS (Complainant) are biological siblings. The Accused is the oldest siblings and the second eldest sibling is Christin who is married and did not live with the Complainant or the Accused at the period of the alleged offending for this matter.*
  - 3. *The Accused and the Complainant's mother's name is Renu Lata who was a taxi driver at the period of the alleged offending.*
  - 4. *The Complainant and the Accused person's father passed away in 2015 and the Complainant was then staying with her mother and her siblings along with the Accused in Tacirua whilst Christin was living with her husband in Samabula.*

5. *The Accused and the Complainant were staying in the same house at Tacirua, during the period of the alleged offending referred to on the information for this matter.*
6. *The matter was first reported to the police by the Complainant and the Accused person's mother and Christin, in January of 2022.*
7. *Accused knows the age of the Complainant that she was born on the 10<sup>th</sup> of September 2009.*

#### **The Prosecution's Case**

11. The Complainant is the biological sister of the Accused. The Accused is the eldest of six siblings, while the Complainant is the second eldest of the female siblings of the family. Their father passed away in 2015, and their mother has been a taxi driver since 2020.
12. According to the evidence given by the Complainant, the Accused had touched her breasts and vaginal area while she was sleeping with her younger sister on the mattress on one of the evenings of 2020. On that particular evening, the Complainant, her younger sister, and the Accused were lying on the mattress. The Accused was beside the younger sister, and the younger sister was beside the Complainant. While she was sleeping in that manner, she felt that someone was touching her breasts and vaginal area. When she got up and checked, she found the Accused had moved from his earlier position and was sleeping near her legs. She told him to go outside until their mother came. The Accused initially refused to go out but then walked out when the Complainant shouted at him.
13. Sometimes before the Covid lockdown in 2021, the Complainant found the Accused was sniffing glue outside of the house when she came home from school with her younger sister. She went inside to change her clothes while her younger sister went to the bathroom, located outside the house. While changing her clothes, the Accused came and started to show his penis. The Complainant covered her body with a towel. The Accused then came

and pushed her neck with his hand. She fell on the mattress with the push. The Accused then removed her towel and penetrated her vagina with his penis. The Complainant tried to push him away. The younger sister then came and pushed the Accused away. Thereafter, the Complainant put her clothes on and ran out of the house with her younger sister to a neighbour's place.

### The Defence's Case

14. The Accused exercised his right to remain silent and did not give evidence. However, he called his mother to give evidence. The mother explained in her evidence the nature of the relationship between the Complainant and the Accused and her aggressive attitude towards the Accused. By presenting the mother's evidence, Defence attempted to establish that the Complainant had a *mala-fide* motive to make up this allegation falsely.

### Evaluation of the Accused's Evidence

15. The Accused is not required to give evidence. He does not have to prove his innocence as his innocence is presumed by law. However, in this case, the Accused decided to present the evidence of his mother. Therefore, such evidence presented by the Accused need to be considered when determining the facts of this case.
16. Lord Reading CJ in Abramovitch (1914) 84 L.J.K.B 397 held that:

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

17. Accordingly, if the Court believes the evidence presented by the Defence is true or may reasonably be true, then the Court must find the Accused not guilty of the offences. Even if the Court rejects the Defence's version, that does not mean that the Prosecution has established that the Accused is guilty of the crime. Still, the Prosecution has to satisfy that it has established, on its own evidence, beyond a reasonable doubt, that the Accused committed these offences as charged in the Information.

### **Credibility and Reliability of Evidence**

18. In evaluating the evidence, the Court needs to first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy of the evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022)).
19. The Prosecution's main witness was eleven years old when the first offence occurred in 2020 and twelve years old in 2021. Hence, her evidence must be evaluated by referencing factors appropriate to her strengths and weaknesses related to her age, mental development, understanding, and communication ability. (vide; *Nalawa v State* [2021] FJCA 188; AAU014.2016 (25 June 2021)).
20. I shall first draw my attention to the issue of probability. Regarding the first Count, the Complainant testified that it occurred while she was sleeping with her younger sister and the Accused on the mattress. They were lying side by side, where the Accused was next to their younger sister, and the Complainant was after the younger sister. However, when the Complainant woke up, after feeling someone was touching her breasts and vaginal area, she found the Accused had moved closer to her legs and lying there. When she asked him

to go out until their mother returned home, he initially refused but later walked out after she shouted at him.

21. I observed that the Complainant did not specifically explain whether she saw the Accused touch her breasts and vagina during the evidence-in-chief. However, during the cross-examination, the learned Counsel for the Defence suggested that she did not see who touched her breasts and vagina. The Complainant denied that proposition and explained further in the re-examination, affirming that she saw the Accused touch her breasts and vagina. Considering the reasons discussed above, I find it possible for the Accused to touch the Complainant's breasts and vagina while they were sleeping on the mattress, as explained by the Complainant.
22. As far as the second Count is concerned, the alleged incident occurred when the Complainant and her younger sister returned home from school. The Accused was sniffing glue when they returned. The Accused came inside while the Complainant was changing her clothes. The younger sister was in the bathroom. The learned Counsel for the Defence submitted that the Complainant's evidence regarding the incident of alleged Rape is contradictory. The learned Counsel submitted that the Complainant testified that there was no one in the house when the Accused penetrated her vagina with his penis. However, the Complainant then explained that her younger sister came and pushed the Accused while he was allegedly committing this crime, contradicting her earlier version.
23. Having carefully considered the evidence given by the Complainant, I have to disagree with the above contention of the learned Counsel for Defence. The Complainant explicitly stated that her younger sister went to the bathroom when she was changing her clothes. The sister was not in the house when the Accused came, pushed her to the mattress, and penetrated her vagina with his penis. According to the Complainant's evidence, the sister came when the Accused penetrated the Complainant's vagina with his penis. Accordingly, it is clear that no one was in the house when this alleged incident occurred, but then the younger sister came and pushed the Accused away, ending the incident. Hence, I do not find any contradictions in the Complainant's evidence regarding this incident.

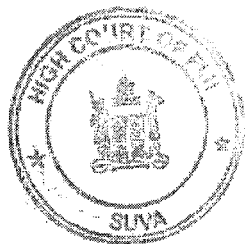


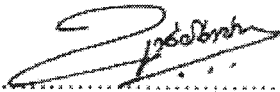
24. The Defence extensively cross-examined the Complainant regarding the relationship between the Accused and the Complainant, suggesting her attitude towards the Accused was aggressive. The Complainant did not deny that her relationship with the Accused was stale. Furthermore, she admitted that she threatened the Accused, saying she would put him in jail. According to their mother, she had started to threaten the Accused in that manner in 2020, which was the time, as claimed by the Complainant, that he had sexually abused her. Therefore, it is probable that the Complainant started to develop an aggressive and hateful relationship with the Accused due to these crimes committed against her.
25. Considering the conclusions, I made regarding the first two Counts in paragraphs 21 and 23 above, I find it was probable to have such a stale and detestable relationship between the Complainant and the Accused due to these crimes committed against the Complainant. Moreover, I find the evidence presented by Defence failed to create any reasonable doubt whether the Complainant had any *mala-fide* motive to invent this allegation against the Accused falsely.
26. I shall now turn to the issue of delay in reporting this matter. Gamlath JA in State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018) has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
27. The Complainant explained that she was scared of the Accused; therefore, she did not relate this incident to anyone until she confided in it with her neighbour Joselyn. The evidence regarding the Accused sniffing glue was not challenged or suggested otherwise; hence, I accept it as unchallenged evidence. Furthermore, the Complainant had to stay with the Accused and her younger sister at home until their mother and brothers return home. Considering the addictive nature of the Accused, and the time the Complainant had to spend with the Accused alone, it is possible that the Complainant was scared of her elder

mother. According to the Complainant, Joselyn had informed Complainant's elder sister Christin about this incident, which Christin eventually related to her mother. The Prosecution neither called Joselyn nor Christin to give evidence.

28. However, Defence called the Complainant's mother to give evidence. She explained that she learned about this allegation from her elder daughter Christin. Christin had told her that Joselyn had informed her about this allegation. The conversation between the Complainant's mother and Christin is admissible to the extent that Christin had made that statement stating Joselyn informed her about this incident. However, that statement is not admissible in evidence of the truth of what was in the statement. (vide **Goundar v State [2020] FJCA 4; AAU29.2015** (the 27th of February 2020).
29. The Defence did not challenge the Complainant's evidence regarding the issue of telling Joselyn about this allegation. Having heard about this allegation, the Complainant's mother and Christin went to Joselyn's house to meet her. The Complainant was also present at Joselyn's home. When the mother asked the Complainant about this incident, she only told her that the Accused had touched her.
30. The evidence of the Complainant's mother is not evidence of the fact that could corroborate the Complainant's evidence, but they are relevant to the issue of consistencies in the conduct of the Complainant; hence, they link to the issues of credibility and reliability of the Complainant's evidence. (vide *Gates CJ in Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014)*). It is sufficient to disclose some material about the unlawful sexual abuse and not required to explain all the ingredients of the alleged sexual conduct. (vide **Raj v State (supra)**). The testimony of the Complainant's mother establishes that the Complainant had disclosed to her that the Accused had sexually abused her. In line with Raj's guidelines, I find that is sufficient; hence, non-disclosure of all the ingredients of the alleged offences to her mother has not affected the credibility and reliability of the Complainant's evidence. Moreover, I do not find the delay in reporting has affected the credibility of the Complainant's evidence.

31. Furthermore, I observed the demeanour and deportment of the Complainant while she was giving evidence. The Complainant's narration of the event in her evidence was descriptive and coherent. She was not evasive but showed distress while elaborating on the events she had encountered.
32. Given the reasons discussed above, I find the Complainant's evidence credible and reliable, and I accept it as the truth. Moreover, the evidence presented by the Defence failed to create any reasonable doubt in the Prosecution's case. The Complainant precisely explained that the Accused touched her breasts and genital area while they were sleeping with their younger sister on the mattress. In respect of the Count of Rape, she explained how the Accused penetrated her vagina with his penis.
33. Having considered the above-discussed reasons, I hold that the Prosecution has proven beyond reasonable doubt that the Accused had sexually assaulted the Complainant by touching her breasts and vaginal area and then, on another occasion, he had penetrated her vagina with his penis.
34. In conclusion, I find the Accused guilty of one of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one Count of Rape, contrary to Section 207 (1) and (2) (a) (3) of the Crimes Act as charged in the Information and convict to the same accordingly.



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

At Suva

13<sup>th</sup> October 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.

