

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

**Crim. Case No: HAC 239 of 2022**

**STATE**

vs.

**PARMITH PRASAD**

**Counsel:** Ms. S. Bibi for the State  
Ms. L. Ratidara for the Accused

**Date of Hearing:** 12<sup>th</sup> to 16<sup>th</sup> June 2023

**Date of Closing Submission:** 14<sup>th</sup> June 2023

**Date of Judgment:** 28<sup>th</sup> June 2023

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**JUDGMENT**

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*(The name of the victim is suppressed she will be referred to as "OD")*

**Introduction**

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 05 August 2022;

**COUNT ONE**

*Statement of Offence*

**ABDUCTION OF YOUNG PERSON:** contrary to Section 285 of the Crimes Act, 2009.

*Particulars of Offence*

**PARMITH PRASAD** on 05<sup>th</sup> day of December 2021 at Suva, in the Central Division, unlawfully took **OLIVIA TALEI DUABELI**, a young person being under the age of 18 years old, out of the possession and against the will of her mother Marica Turua who had lawful charge of the said **OLIVIA TALEI DUABELI**.

**COUNT TWO**

*Statement of Offence*

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

*Particulars of Offence*

**PARMITH PRASAD** on 05<sup>th</sup> day of December 2021 at Suva, in the Central Division, unlawfully and indecently assaulted **OLIVIA TALEI DUABELI**, by kissing her lips, sucking her neck and shoulders, and fondling her breast.

**COUNT THREE**

*Statement of Offence*

**ASSAULT WITH INTENT TO COMMIT RAPE:** contrary to Section 209 of the Crimes Act, 2009.

*Particulars of Offence*

**PARMITH PRASAD** on 5<sup>th</sup> day of December 2021 at Suva, in the Central Division, assaulted **OLIVIA TALEI DUABELI**, with intent to commit rape.

**COUNT FOUR**

*Statement of Offence*

**RAPE:** contrary to Section 207 (1) and (2) (b) of the Crimes Act, 2009.

*Particulars of Offence*

**PARMITH PRASAD** on 5<sup>th</sup> day of December 2021 at Suva, in the Central Division, penetrated the vagina of **OLIVIA TALEI DUABELI**, with his finger, without her consent.

2. Upon the Accused pleading not guilty, the trial commenced on the 13<sup>th</sup> June, 2023. The complainant OD and Orisi Amarakhi were led in evidence. The mother of the victim Marica Turua could not be found as such the prosecution closed its case.
3. As there was no evidence in respect of Count No. 1 the Accused was acquitted of Count 1 and the defence was called in respect of Count No. 2, 3 and 4. The Accused gave evidence and also called his daughter Jaanvi Diya Prasad and closed the defence case.
4. Upon the close of the Defence both parties made their closing submissions and also tendered the same in the written form on 22<sup>nd</sup> and 27<sup>th</sup> June 2023 and the judgment is thus pronounced.

### **Elements of the Charges**

5. For the accused to be found guilty of count No. 2 that of “sexual assault” under section 210 (1)(a) and (2) of the Crimes Act, the prosecution must prove beyond reasonable doubt, that the accused himself on the date and place specified in the charge, did unlawfully and indecently assault the victim as described in the charge.
6. Sexual assault is an aggravated form of indecent assault. The prosecution must prove the above elements against the accused beyond reasonable doubt. “Assault” is to apply unlawful force to the person of another without his or her consent. The “assault” must be considered “indecent” by right thinking members of society. The test is basically objective.
7. The ingredients of Sexual assault under the 1<sup>st</sup> limb of section 210 and indecent assault as defined under section 212 of the crimes Act are the same except for the titles of the respective sections. It appears that sexual assault is an aggravated form of indecent assault as it carries a higher sentence. Thus, considering the use of the word ‘*sexual*’ in the title of section 210, I am of the view that, sexual assault should necessarily be involuntary contact of a ‘sexual’ nature that occurs through the Accused's use of force, coercion or the victim's incapacitation.
8. For the Accused to be found guilty of Count No. 3 that of assault with intent to commit rape contrary to section 209 of the Crimes Act, the prosecution should prove beyond

reasonable doubt that the Accused himself did assault the victim and the said assault was committed with the intent to commit rape. Assault will mean any form of hostile or adverse act done towards the victim and without the consent of such person.

9. For the Accused to be found guilty of the count No. 4 that of Rape based on sub sections 1 and 2(b) of Section 207 of the Crimes Act, in addition to the date and place stated in the count the prosecution must prove beyond reasonable doubt, the following elements, that;

- i) The Accused,
- ii) Penetrated the vagina with his finger,
- iii) The Complainant did not consent to the Accused to the said penetration,
- iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his finger in that manner.

The slightest penetration of the complainant's vagina by the Accused's finger is sufficient to satisfy penetration.

10. If I may elaborate count No.4 that of rape is based on sub section 2(a) of Section 207 of the Crimes Act. Under this sections, the offence of Rape is constituted when a person penetrates the vagina without that other.

11. Person's consent. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to so give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.

### **Presumption of Innocence**

12. The accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove their innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredients or on the of evidence led by of

the prosecution the Accused must be found not guilty of the charges and accordingly acquitted.

13. **Amended Admitted Facts**

- a. The name of the person charged is Parmith Prasad [“Parmith”], aged 36 years old at the time of the alleged offences.
- b. Parmith resides at Wrong Turn Street, Sakoca Road, Tamavua, Suva with his parents and daughter Jaanvi Diya Prasad.
- c. In 2021, Parmith owned a vehicle registration number, JS 968 which was grey in colour.
- d. The Complainant in the matter is OD.
- e. On 5<sup>th</sup> December 2021, Parmith with OD went to drop his daughter Jaanvi Prasad to a friend’s place at Sekoula Road, Laucala Beach in his car vehicle registration number, JS 968.

**Prosecution Case**

14. According to the evidence of PW 1 OD she was around 18 years when she gave evidence. Her date of birth is the 21<sup>st</sup> December, 2004 in support of which the birth certificate was marked and produced as PE1. On 5<sup>th</sup> December, 2021 she was returning home after visiting friend the previous night. When she was on her way home she had seen a car parked and has requested for a ride and got into the car. The Accused had been the driver and on the rear seat his daughter Jaanvi was there with a puppy. OD had got into the rear seat, and wanted to go to Reservoir Road. They have driven up to the main road and then the car had proceeded to a house where the daughter was dropped off. Then OD with the driver had driven to Valelevu and the Accused had bought some cans of Joskees. Then she says that they drove to Vatuwaqa, close to the Rups Big Bear Shop and has parked near an office. By this time she was consuming the Joskees. She said that there was nobody around to be seen in that office complex. The glasses of the car she said were tinted.
15. When asked why she drank the Joskees she said because the driver asked her so. At that place the driver whom she identified to be the Accused has started touching her and fondling her. Then she had removed her clothes and when asked why she removed the clothes she said the Accused wanted her to remove and so she did. She also said that she was drunk. The Accused had then started to touch her and kiss her. He had fondled her private part which she referred to as “mimi”. The Accused had also asked her to touch his male private part. The Accused has also touched her breast.

16. Then they have driven to Nasese and parked near a yellow house somewhere along the sea wall. She says that when the car was driven from Vatuwaqa to Nasese she was not wearing any clothes. At Nasese the Accused had started to bite her neck. She had told him that she had to meet a friend at 7 o'clock and wanted to go to the town. She had then told him to stop biting her neck when the Accused had started to slap her face and also she said that she tried to choke her. The Accused had then open the car door and stepped out to urinate. She at that moment had taken her clothes and the bag, got off the car and started to run. The Accused had been standing beside his car. He had not pursued her.
17. As she was running away PW2 who was an army officer had seen her and come and taken her to a lady who was standing there. That lady has given her "sulu vakatoga" which she had wrapped around. The army officer had asked her what happened; she had not told him anything. She said that she was afraid. The Accused's car was parked about 10 to 15 meters away. It had been somewhat dark and then she said that the soldiers brought her to the Totogo Police Station. Then she was taken to the hospital and had been examined by a doctor.
18. When she was asked further she did say that the Accused used his hands to touch her inside and then said that he put his fingers inside her private part. She had felt his fingers "going inside"; she said. She had never seen this Accused before this and now she knows his name to be Parmith and the police had given her that name. She identified the Accused in open court.
19. In cross-examination she admitted going to this friend the previous night and drinking. That was someone whom she got to know through the Facebook just 4 days before. She had not told her mother or the grandmother about going to meet her friend. It was suggested that she did not get off the car when the car came to the main road and she continued to be in the car on her own. She denied this. She admits coming to the front seat and drinking Joskees on own volition. She admitted that this was not the first occasion but she had drunk Joskees before.
20. The defence also suggested that when the Accused kissed her, she kissed him back and she also touched his penis. It was also suggested that she was wearing a panty and the Accused touched her private part over the panty. She denied all these suggestions. She

admitted that he made love bites whilst kissing. She also admitted that she wanted to meet a friend at 7pm that day.

21. The defence suggested that she got off the car to urinate and it was at that time that she removed her pants, which she denied. She also admitted that she thought she was in trouble when the army officers approached her. It was further suggested that slapping, choking and poking his finger were fabricated or made up by her; she denied the same. In re-examination she said that she ran without her clothes because he tried to choke her.
22. **PW2 Orisi the army officer** had been on his way in a vehicle with some soldiers along the Nasese road. He had seen a girl running naked with her front part covered with her hand holding her clothes in front of her body. When he approached and asked her she had looked scared and had said “o kaya tarai au”. This meant that she was touched. She had pointed out to a car parked nearby. The officer has gone up to the car and got the driver back into the vehicle and taken him to the police station along with the victim. Whilst taking the Accused he had found out his name that he was married. He said that the girl looked frightened.

### **Evaluation**

23. In the present case, both the credibility of the complainant OD and the reliability of her evidence were attacked in cross-examination.

### **Credibility and Reliability**

24. Merely by deciding that the evidence of a witness is credible will not be sufficient to determine the testimonial trustworthiness of a witness. In considering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the *credibility* or veracity and the other is the *reliability* or accuracy. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relates to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the

reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is an honest witness may however, still be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526): 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288]; State v Solomoni Qurai [2022] HAC 14 of 2022.

25. Thus, I will consider the credibility and reliability of witness OD separately. The victim OD had been taken to the police and has made a prompt statement there were no significant contradictions or omissions. I find no apparent reason or of any motive for her to make a false complaint against the Accused either. To that extent she appears to be a credible witness. However that by itself is not sufficient to accept and act upon a witness' evidence as it should also be reliable.
26. OD was drinking Joskee and admitting that she was drunk becomes a relevant consideration in evaluating her evidence specially her reliability as opposed to credibility. She did narrate a sequence of events but there appears to be a great degree of unreliability which I will consider now. Firstly, she said that it was around 1 o'clock mid-day when she came out to the road and got in to the car. Then she says that she reached Vatuwaqa around 4 o'clock and then it was around 7 o'clock when she was found running naked. She was unable to explain as to what happened between 1pm and 4pm a period of almost 3 hours. Then as to why she drank Joskees is also unclear; on one occasions she said that because the Accused told her and then later she said she willingly consumed Joskees. However, the end result is that she admitted drinking that day.
27. In cross-examination she also admitted that she was drinking with a friend before she left and met the Accused. So it appears that she had been drinking continuously when she met the Accused. This explains as to why she is not sure as to the time she met the Accused and what happened during the 3 hours, which is none other than that, of intoxication.
28. Then she claims to have removed her clothes at Vatuwaqa and was naked when she travelled to Nasese. She does not say that she was forced or the Accused forcibly



removed her clothes. Therefore, she appears to have on her own volition and voluntarily removed her clothes on her own. No doubt intoxication had a part to play.

29. As to touching her private part she did say that the Accused did touch her “mimi”. She did not in the first instance on her own say that the fingers were inserted into her private part. It was only upon she been questioned almost by leading questions that she came out with the penetration of the fingers. Then she runs away naked taking all her clothes and the bag. According to her it was because the Accused tried to choke her that she escaped in this manner. Accused had left the car to urinate and it is during that time she claims to have so run away. When she met the military officer she did not tell them of any such incident or an attempt to rape her. She had merely said that she was in trouble.
30. OD was running away stark naked whilst holding her clothes against her chest. This was around 7 o’clock in the night when darkness was falling. It is certainly not normal and is unusual for a girl of this age to behave in this manner and run away along the road without the clothes. This does at first blush appear that she was in some danger and was making an escape or get away. This is the first impression and the immediate inference that arises from these circumstances.
31. She admits that at 7 o’clock she was to meet a friend in the town. This was during the Covid period. This area appears to be somewhat of a lonely stretch.
32. One possible inference is that in a state of intoxication she was behaving irrationally and was running away in this manner. When so running away she met by a military officer. She admitted that she thought she was in trouble when she was found by a military officer in this manner. So did she at that moment come out with some allegation against the Accused to protect herself or due to shame or fear? If she was slapped and choked moments before she met the military officer one would expect her to tell him that the Accused did so and that’s why she was running away. She had not told anything to the military officer. This is rather unusual. If she was escaping from a rapist who had attempted to rape her one would expect for her to tell the same to the person who comes to her assistance. She had not done so.
33. I carefully observed her demeanour when she was giving evidence. It was quiet

apparent that she was either not sure of the happenings of that day or she was extremely reluctant to disclose the incident. She responded by merely stating that she cannot remember on many an occasion. She did not look straight in answering questions and giving evidence. This clearly was consistent with a witness who is concealing something or was not truthful. Especially I observe that she was reluctant and did not tell in the first instance of the Accused penetrating his finger into her private part. When repeatedly questioned and probed, she in the first instance said that the Accused touched her private part. It was with great persuasion that she came out with the alleged penetration of the fingers. This vagueness and uncertainty may be due to she being in a state of intoxication after drinking the whole night and also drinking Joskees whilst in the car. Whatever may be the reason her evidence does not appear to be reliable either due to poor memory due to intoxication or otherwise.

34. In the above circumstances considering the prosecution evidence I find that the evidence of the victim OD is unreliable and unsafe to act upon. In these circumstances it is not necessary to go further and consider the defence case. However, for completeness I would consider the defence position.

### **Defence Evidence**

35. The Accused gave evidence and he generally admits picking up OD, buying Joskees and going to Nasese sea wall area and parking his car. His position is that she was willingly drinking Joskees and she had consented to certain sexual acts of kissing and touching. Accused said that she herself touched his penis. At one point she had got off the car to urinate and then had removed her pants for that purpose and had then suddenly taken to her heels. The Accused remained near his car.
36. When an Accused gives evidence if it is accepted or if the court is unable to accept or reject and come to an intermediate position then the Accused should get the benefit of his evidence. The court should be able to completely reject his evidence if not the Accused will be entitled to the benefit of the doubt that may arise there from. This is now referred to as the *Liberato* principles as laid down in *Liberato V. The Queen* (1985) HCA 66: 159 CLR 507 (17 October 1985) and then modified in the case of *Anderson* [2001] 127 [A] Crime R 116 Act 121 para 26, simply means the trial Judge should consider and evaluate the evidence of the Accused in the following lines; [i] if

you believe the Accused's evidence or his account he must be acquitted; [ii] If you do not accept the evidence of the Accused but you consider that it might be true you must acquit; and [iii] If you do not believe the Accused's evidence you should put that evidence to one side and should consider the evidence that is accepted as true and determine if the Prosecution has successfully proved the guilt of the Accused beyond reasonable doubt.

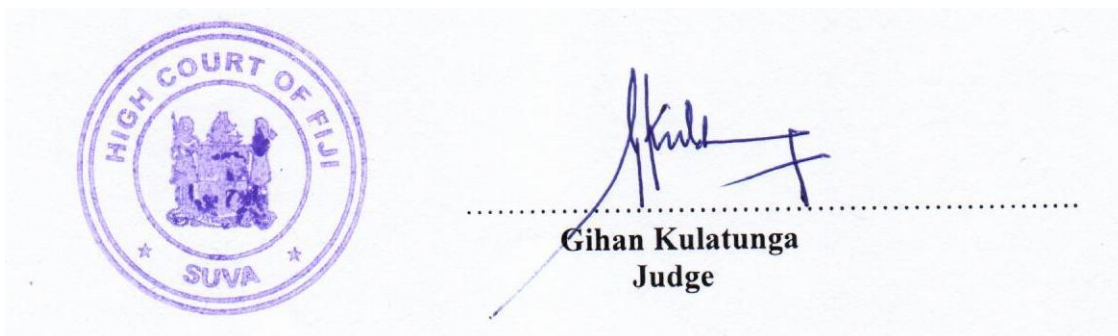
37. In the present case the Prosecution evidence to some extent supports the Accused's version as follows. OD admits that she voluntarily consumed Joskees. She does not specifically say that the initial touching and kissing was without her consent. Even the touching of her private part she did not say that she objected or that she did not consent. She admitted removing her clothes on her own. This evidence that of OD is clearly consistent with voluntarily and consensual engaging of some sexual activity. In the normal course of events you would not expect a person to remove her clothes in the presence of a total stranger in this manner and especially in a public place. Such events taking place in this manner leads to the inference that she was engaging in this activity with consent may be she was intoxicated to some extent. However, according to the army officer PW2 she had appeared to be frightened but did not say that she was drunk or intoxicated. The fact that she was able to take her clothes and run in this manner shows that she was to some extent she was in-control of her actions.
38. It is also admitted that she had to meet someone at 7 o'clock that evening in the town. In this state of mind and intoxication it may be possible that she ran away to keep that appointment. OD as well as the army officer admit that the Accused remained near the car, he did not chase OD at the outset nor did he try to escape. Considering this evidence in its totality this court is unable to totally reject the evidence of the Accused as being untruthful or false.
39. In the above circumstances considering the totality of the evidence there is a serious doubt as to whether OD engaged in these act of sexual activities with consent. That being so this will affect Counts No. 2 and 4 as lack of consent is a necessary element. As for Count No. 3 this will affect the element of assault and further there is no evidence direct or otherwise to prove that the alleged slapping and choking was committed with the intent to commit rape. What OD says is that when he was biting her

neck, she resisted and that he got aggressive then and slapped her and try to choke her. In the same breath she says that the Accused then stopped these activities and got off the car to urinate. In the normal course of events an Accused who is aggressively acting with an intent to commit rape will not stop his pursuit and leave his prey at this stage. Especially one would not expect him to leave the car. This conduct is not consistent with the conduct of a person acting with the intent to commit rape. Therefore, the prosecution evidence considered at its best has failed to prove the vital element that the assault was with the intention to commit rape.

### **Conclusion**

40. In the above circumstances I am of the view that the evidence of the victim OD is unreliable and unsafe to act upon. Apart from the complainant there is no evidence of any nature to prove these charges. That being so I also I am unable to reject the Accused's evidence in his totality. Accordingly, I hold that the prosecution has failed to prove the charges against the Accused beyond reasonable doubt. The Accused is thus acquitted of all charges.

41. Accused is acquitted.



### **At Suva**

28<sup>th</sup> June 2023

### **Solicitors**

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused