

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 69 of 2021

BETWEEN: **THE STATE**

AND: **SUREND PRASAD**

Counsel: **Ms. E. Thaggard for the State**
 Mr. R. Dayal for the Accused

Date of Trial: **8 – 9 May 2023**

Date of Judgment: **14th September 2023**

JUDGMENT

1. The Court has granted name suppression to the victim therefore he will hereafter be referred to by his initials and any other identifying information will be removed to protect his anonymity.
2. The Accused Surend Prasad is charged on the following Information: -

[COUNT 1]

Statement of Offence

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

Particulars of Offence

SUREND PRASAD between the 1st day of April 2021 and 30th April 2021, at Labasa in the Northern Division unlawfully and indecently assaulted **RS** by forcefully putting the said **RS**'s penis into his mouth.

[COUNT 2]

Statement of Offence

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

Particulars of Offence

SUREND PRASAD between the 1st day of April 2021 and 30th day of April 2021 at Labasa in the Northern Division penetrated the anus of **RS** with his anus penis without the consent of **RS**.

3. The Accused was first produced in the Labasa Magistrate's Court on the 7th of October 2021 and the case was then transferred to the High Court and he was arraigned on the 18th of November 2021.
4. The Information was amended on the 7th of February 2022 and the Accused entered a plea of Not Guilty to both counts.
5. The matter was adjourned for pretrial conference and the parties also filed the following Agreed Facts: -
 - (a) **THAT** the Accused is Surend Prasad, 50 years old, farmer of Bulileka, Labasa.
 - (b) **THAT** the victim is RS, 13 years old, student of Bulileka, Labasa.
 - (c) **THAT** at the time of the alleged offence, the Victim and the Accused were neighbours with their homes being 20 metres to 30 metres apart.
 - (d) **THAT** the victim and the Accused are known to each other.
6. The parties also filed the Pretrial Checklist, and the matter was fixed for 2 days Trial on the 8th and 9th May 2023.

The evidence for the State

7. The State called two witnesses, the victim RS and his grandmother.
8. RS testified that he was born on 17th November 2007 and in April 2021 he was still 13 years of age and he lived in Mani Road, Bulileka, with his parents.

9. In his evidence, RS testified that the Accused is his neighbour and on the date in question, around April 2021, he had come to his home to request his help in feeding the chickens.
10. The home of the Accused is 20 to 30 metres away from the victim's home. His grandfather told him to go and help so he went with the Accused.
11. They went to the Accused's house and RS went and took the chicken feed and he went and fed the chickens. When he returned to the house, the Accused told him to go and get him some water from the fridge.
12. At this time the Accused was in his room so RS brought the water to him and he returned to the kitchen to feed the chickens through the kitchen doorway. As he did this, the Accused Surend came out of his room and grabbed him from the back, grabbing his mouth first, covered it and he then carried him into the room. As he carried RS into his room, RS tried to hit him with his elbows.
13. The Accused covered his mouth and tied his hands and carried him to the bedroom. On further questioning by State counsel, he stated that the Accused tied his hand in the middle of the living room. The Accused came from his wife's bedroom, which was side by side with his room and only separated by a curtain. He tied RS's hands and carried him into his room.
14. The Accused both of RS's hands and tied it with raffia strings. He also tied RS's ankles with the raffia string.
15. At this time RS told the Accused to stop as he was frightened of what the Accused was doing.
16. After tying RS's hands and ankles, the Accused then pulled RS's pants down to below his knee near the ankle. After he pulled RS's pants down, the Accused then put RS's penis into his mouth. As the Accused did this to him, RS was afraid, and he could not do anything, and he did not like what the Accused was doing to him.
17. On questioning by counsel, RS stated that at this time he was against the wall and the Accused was on his knees in front of him.

18. After he did that the Accused then threw RS on the bed and he fell face down on the bed. The Accused then came over him and inserted his penis into RS's anus. He felt pain and he did not he did not say anything because he was afraid.
19. As the Accused was doing this the victim was also struggling and eventually managed to free himself and he hit the Accused with his elbows, causing him to fall down. As the Accused was on the floor, he then gathered up his clothes and ran outside.
20. When he reached home, he did not tell anyone immediately. Two days after this incident, the Accused came to their house to drink grog and at this time he told his grandmother that the Accused had done bad things to him.
21. The victim then identified the Accused in Court as the person who did these things to him that day.
22. Under cross examination he confirmed that this incident happened around the time of Ram Naumi and the Accused had a shed constructed outside his home with prayer services conducted at night.
23. He also confirmed that he gave three statements to the Police and in the statements recorded by the Police he stated that the incidents occurred in September however under oath he confirmed that the incidents happened at the period of Ram Naumi in April.
24. He maintained however that the house was empty that day when he went there to feed the chickens and he maintained that the Accused did sexually assault and rape him that day.
25. The second witness was Krishna Kumari, domestic duties, formerly of Bulileka, Labasa and now residing at Malolo, Nadi. She is the grandmother of the victim RS and in 2021 they were living together in Bulileka, Labasa.
26. She recalled that sometime in 2021, her grandson came and told her that Surend Prasad did bad things to him. He did not specifically describe what the Accused did to him but he did say that Surend that the relation was like when a man and a wife stays, that kind of relationship.

27. Under cross examination she confirmed that she was not aware that the Accused had come to request RS to go to his home to hold him feed the chickens.
28. At the close of the State's case, the Accused elected to testify under oath and to call witnesses on his behalf as well.

The evidence for the Defence

29. In his evidence he confirmed that in 2021 he lived in Bulileka, and he kept about 40 to 50 chickens which he cared for alongside his wife.
30. He confirmed that in 2021, he hosted the Ram Naumi prayers at his home and he had erected a shed outside his house to hold the prayers in. He denies all the allegations made against him that he sexually assaulted and anally raped RS inside his home either during this Ram Naumi period or in September as he was questioned by the Police.
31. He maintained this evidence under cross examination. He confirmed that he knew the victim's family especially his grandfather Chattur Singh, with whom he would occasionally drink kava with. He denied all the other allegations made against him by the victim.
32. The second witness called was one Shakeel Sanjeshwar Dutt and his evidence was not really relevant to the charges in the Information therefore it serves no purpose to recount it here.
33. The third witness called was Maya Wati, the wife of the Accused. She confirmed that she and the Accused have three children and in 2021 only the youngest daughter was living with them however she would only stay at home on Saturdays and Sundays. In relation to the allegations against her husband, she states that she was always at home and at no time did the victim RS come to their home and she was always at home so she would know if he came around.
34. She maintained her evidence under cross examination, and she denied that she was lying to save her husband.
35. That was the evidence for the Defence, and the matter was then adjourned for the transcripts to be prepared and for the parties to file submissions.

36. The parties have both prepared and filed written submissions and the Court is grateful to counsel for their submissions, which has assisted it in assessing the evidence presented at the trial and the disclosures already filed in these proceedings.

Analysis

37. For the first count the Accused is charged with Sexual Assault contrary to section 210 (1) (a) of the Crimes Act 2009.

38. The relevant section provides: -

“Sexual assaults

210.-(1) An person commits an indictable offence (which is triable summarily) if he or she—

1. (a) unlawfully and indecently assaults another person; or
2. (b) procures another person, without the person’s consent—
 1. (i) to commit an act of gross indecency; or
 2. (ii) to witness an act of gross indecency by the person or any other person.

Penalty— Imprisonment for 10 years.”

1. For the second count, the Accused is charged with the offence of Rape contrary to section 207 of the Crimes Act 2009, which provides:-

“The offence of rape

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

Penalty— Imprisonment for life.

(2) A person rapes another person if-

1. (a) the person has carnal knowledge with or of the other person

without the other person’s consent; or
2. (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

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

consent.

(3) For this section, a child under the age of 13 years is incapable of giving consent.”

39. The State alleges that on the date and time in question, the Accused sexually assaulted RS by seizing him, tying up his hands and ankles, and put RS's penis in his mouth.
40. The State further alleges that the Accused, after doing that, he threw RS on the bed in his stomach and penetrated his anus with his penis. The State contends that the Accused committed these acts without the consent of the victim RS.
41. The burden is on the State to prove each count beyond a reasonable doubt. The Accused elected to give evidence although he does not have to prove or disprove anything.
42. The Accused, in his testimony, has denied all of the allegations against him
43. To prove the offence of Sexual Assault the State has to establish the following elements of the offence: -
 - That between the 1st of April 2021 to 30th April 2021 at Labasa in the Northern Division, Surend Prasad assaulted RS
 - The assault was unlawful and indecent – putting RS's penis in his mouth
 - The assault was without the consent of the complainant RS
 - Surend Prasad knew that RS was not consenting
44. To prove the offence of Rape, the State has to establish the following elements of the offence: -
 - o That between the 1st of April to 30th April 2021 at Labasa in the Northern Division Surend Prasad penetrated the anus of RS with his penis
 - o RS did not consent to the penetration of his anus
 - o Surend Prasad knew that RS was not consenting to the penetration.

45. The slightest penetration is sufficient, there does not need to be ejaculation to prove the offence. There is no longer any requirement for any corroboration for sexual offences – section 129 of the Criminal Procedure Act 2009.

46. In State –v- Kanacuva Criminal Case No. HAC 169 of 2021, Justice Goundar, in ruling on an Information charging Sexual Assault and Rape made the following observations with respect to both offences: -

“[11] An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act one that causes fear or pain.

[12] The word indecent means contrary to the ordinary standards of respectable behaviour. For an assault to be indecent it must have sexual connotations or overtones.”

47. Consent is defined in law at section 206 (1), (2) of the Crimes Act 2009 as follows: -

“(1) The term “consent” means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

(2) Without limiting sub-section (1), a person’s consent to an act is not freely and voluntarily given if it is obtained–

(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.”

48. The main witness for the State is the complainant and in the main I found him not to be a very impressive witness. He was not clear about the dates and in the initial

investigations and the statements recorded by the Police pointed to these events happening in September 202, however his testimony in Court pointed to the events happening around April around the Ram Naumi prayers. His testimony in Court appeared pre rehearsed and when he was pressed under cross examination it did not stand up. He was vague about the dates and even with the recent complaint witness he was vague about what happened. To some extent this is understandable as she is his grandmother.

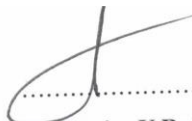
49. The first count and the events testified about the same does not seem credible. The victim, in the middle of the day in a rural settlement did not manage to raise the alarm when he was being assaulted. The time spent on tying his limbs with raffia string, he could not raise the alarm at that stage. This raises reasonable doubt as to whether this happened at all.
50. The burden on the State is very high and it remains on the State throughout the Trial. I find that there is reasonable doubt with respect to each count on the Information and this doubt will be exercised in favour of the Accused.

This is the Court's Ruling in this matter: -

1. **Surend Prasad on the first count of Sexual Assault – you are acquitted.**
2. **Surend Prasad on the second count of Rape – you are acquitted.**
3. **All bail conditions are revoked, you are free to go.**

30 days to appeal.




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Mr. Justice U Ratuville
Acting Puisne Judge

Solicitors:

Office of the Director of Public Prosecutions for the State
Sarju Prasad Esquire for the Accused