

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

**Criminal Case No. HAC 230/2022**

STATE  
V  
PREM CHAND

**COUNSELS:**

<b>Ms. S. Bibi/ Ms. U. Tamanikaiyaroi</b>	-	<b>For State</b>
<b>Ms. Boseiwaqa/Ms. Chand</b>	-	<b>For Accused</b>

**Date of Hearing: 29 August – 01 September 2023**

**Date of Judgment: 15 September 2023**

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**JUDGEMENT**

(The name of the victim is suppressed, as requested by the Prosecution, and will be referred to as AL in this Judgement)

1. The accused in this matter, **Mr. PREM CHAND**, was charged with one count of **Rape** against AL (**Prosecutrix**), a child under 13 years of age without her consent, as below:

**COUNT ONE**

*Statement of Offence*

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

*Particulars of Offence*

**PREM CHAND** on an unknown date between the 1<sup>st</sup> January, 2021 and 15<sup>th</sup> June, 2022, at Muanikoso Settlement, in Narere, in the Central Division, penetrated the vulva of AL, with his fingers, a child under the age of 13 years.

2. Upon reading of the charges in Court on 08<sup>th</sup> September 2022, **Mr. Prem Chand** understood and pleaded not guilty to the charge filed against him. At the trial, the Prosecution led the evidence of 2 witnesses, including the evidence of AL the victim. At the end of the Prosecution case, since the Court was convinced of the availability of a prima facie case for the Prosecution, acting under **Section 231** of the **Criminal Procedure Act of 2009**, Defense was called from the Accused and all the available options were explained to the Accused.
3. At this juncture, the Accused opted to remain silent in the dock and no witnesses were summoned to give evidence on his behalf. At the end of the Defense case, the Court heard oral submissions from Counsel representing the Prosecution and the Defense. Having carefully considered the evidence presented at the trial, this Court now proceed to pronounce the judgment in this matter, as below:

#### **Element of the offences**

4. The main elements of the offence of Rape under **Sections 207(1) and (2) (b) and (3)** of the **Crime Act 2009** applicable to this matter are:
  - i) The Accused;
  - ii) Penetrated the vagina of the Complainant with his finger;
  - iii) The Complainant did not consent the Accused to penetrate the vagina with his finger;
  - iv) The Accused knew or believed or was reckless that the Complainant was not consenting for him to insert his finger in that manner.
5. However, in this matter since the victim was below 13 years of age, the iii) and iv) elements in relation to consent will not apply by the application of Sub-section (3) of Section 207 of the Crimes Act of 2009, which reads as follows:

*“For this, a child under the age of 13 is incapable of giving consent”.*

#### **Burden of Proof**

6. The Accused is presumed to be innocent until he is proven 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 his innocence. The prosecution must prove the Accused’s guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the Court was not sure of the guilt of the Accused, or if there be any hesitation on the part of this Court of the establishment of the ingredients or on the of evidence led by the Prosecution the Accused must be found not guilty of the charge and accordingly acquitted.

#### **Prosecution Case**

7. The charges filed in this Court stems from the information received from the victim in relation to the act done to her by the accused. Therefore, this Court considers it pertinent to succinctly stipulate the evidence given by the victim (AL) in Court, which also created conflicting versions of the trajectory of events in her evidence in chief and cross-examination, as below:

“Chief

- *I am 14 years old. I am currently residing in Narere with my mother and father.*
- *I lived in Monikoso settlement with my mom and uncle Prem Chand. He is related from my mother’s side; he is my mom’s brother.*
- *I have known this uncle since I was very small.*
- *During January 2021 to June 2022, I lived in Monikoso housing. I lived with my mom and two uncles.*
- *Prem Chand was elder than my mother and Sunil was younger. I was close to Prem. He was helping me more. I was happy about this. He is not good today, since of the case.*
- *Case is the rape case, rape case is related to Prem. He did rape me. He inserted his finger.*
- *This happened in Monikoso. This happened in the night. I was sleeping on the bed, no one else was there.*
- *I felt that somebody was trying to wake me up by shaking. Then he penetrated his finger.*
- *At that time lights were off. I saw the person who woke me up, it was the Accused.*
- *The Accused was beside the bed. The Accused was one meter away from me.*
- *I saw him for a short time. I saw him since light was coming from the other room. The other room was close to my room. Light was on the ceiling. There was nothing blocking the light, it was bright.*
- *After waking me up, Prem inserted his fingers between the legs. That part is used in the washroom to urinate.*
- ***In a diagram the witness circles the genital area, as the part of her body in issue subject to this crime.***
- *Prem inserted one figure. Witness shows the insertion between the legs of a Dall.*
- *It was done for a quite a long time. It was burning in my vaginal area. This was when Prem put his finger to my vagina.*
- *At that time, I was wearing cloths, jeans and a top. I was also wearing a panty.*
- *Accused pulled my jeans down and the panty down. When he was doing that, I asked him what are doing? He said nothing.*
- *I shouted for help. I was crying.*
- *Then Ritesh Lal came, that is our neighbor. He hit the Accused. He asked for money from the Accused.*
- *After that the Accused closed the door and went to sleep. Ritesh went home.*
- *I did not tell my mother, since she was not there. After she came home, I told, but she said nothing.*
- *I told a teacher, who told the police.*
- *When Prem did this, it was painful near vagina. Accused did this once.*
- *Accused was rubbing his finger for a short time.*
- *I saw Prem last when the police took him.*
- ***Accused is identified by this witness on the dock when the screen is removed.”***
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8. Thereafter, before the cross-examination the Court adjourned for a tea break and the witness was taken to a secure room through the corridors of the building passing the public seating outside the Court room. When the Defense counsel started cross-examination, she went on to narrate a long story to which this witness continued to answer to each question “Yes My Lord” like accepting the narration of a well-rehearsed story. In this light, this Court finds it relevant to stipulate the line of cross-examination of the Defense counsel, as below:

*“Ms. Boseiwaqa: And Ritesh usually causes trouble to your uncle? Ritesh normally comes and causes fights with your uncle?”*

*Ms. Archana: No, My Lord.*

*Ms. Boseiwaqa: He would come to your uncle late at night when he’s drunk banging on the door? Well he would come to your house at night, correct?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And at times when he would come at night he would yell first of all?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And at times he would hit the walls of the house that you were living in?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: He would also throw stones at the house, correct?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And sometimes when he would do this, he would be drunk, yes?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: So you were afraid of Ritesh Lal, you were scared of Ritesh Lal?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: Because of these kinds of behaviors that he would do, yes?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: Now on the day that you mentioned that Ritesh came into the house, he was actually banging on the door, correct?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And your uncle Prem had opened the door for him?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: When your uncle Prem opened the door he demanded money from your uncle Prem, correct?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And your uncle Prem had told him that he had no money.*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And when your uncle Prem said no to him, Ritesh punched your uncle Prem.*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And after punching your uncle Prem, Ritesh then pushed your uncle Prem?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: Then Ritesh came into your room?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And your uncle Ritesh told you to take off your clothes.*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And you got scared and you took off your clothes.*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: On that day you were wearing your jeans pants which you took off, your panty and your top which you also took off, yes?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And Ritesh then was the one that touched you.*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: Your uncle told Ritesh to leave and he refused.*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: After a while then Ritesh finally left for his house?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: Your uncle Prem closed the door and he went and reported the matter to the police.*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: So on this day you are alleging what happened to you, it was actually the neighbor Ritesh who had done it, not your uncle Prem.*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And what you're telling the Court today is the truth, Archana?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: Now you had stated in your evidence in chief to Ms. Bibi earlier on that this incident appened only once, correct?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: And when you say that it happened only once, you're referring to the time that you were touched by Ritesh?*

*Ms. Archana: Yes, My Lord.*

*Ms. Boseiwaqa: So it was never your uncle Prem who committed the acts to you? Perhaps I can rephrase that question. When you had stated earlier in evidence as to the person who had touched you and you had pointed to the doll. My Lord, can I have the doll please? Now when you gave evidence and said that you were touched here, it was by Ritesh Lal. Not your uncle Prem.*

*Ms. Archana: Yes, My Lord."*

9. Faced with two contradictory versions of commission of the crime by two different individuals, to clarify the obscurity, this Court questioned the witness (AL). In answering the quires raised by the Court this witness mentioned that Ritesh Lal came inside their house and hit everyone. She also mentioned that Ritesh Lal told not to tell anyone. She alluded that she went and told her teacher that her uncle did the sexual act and did not mention a name, where Ritesh Lal is also her uncle. Since Court questioned the victim (AL), Prosecution and the Defense were given an opportunity by Court to clarify any quarries that have risen due to the Court questioning the witness.
10. In answering the questions raised by the Prosecuting counsel, (AL) mentioned that when she left the Court room for the break, she saw her parents and aunty outside the Court room. (AL) admitted that she changed her story after the break and told the Court that it was Ritesh Lal who did the wrongful thing to her, and it was not her uncle Prem Chand. At that juncture, she confirmed that what she said in the morning was true and Prem Chand did those acts to her. She alluded that she went back on the story she said in the morning since she feared her aunt.
11. She affirmed that she became afraid when she saw her parents and aunt outside the Court. She confirmed that she is not afraid of her parents, but she feared her aunt when she saw her, since she had told her to save Uncle Prem Chand when they moved to Narere and this witness categorically testified in Court that she passed the blame to Ritesh after seeing her aunt in Court and she changed the story she mentioned in the morning during evidence in chef. In the same breath, she confirmed Court that the Accused put his finger to where she urinates as she said in the morning.
12. Thereafter, in answering the questions of the Defense counsel in clarifying the queries raised by the Court, she affirmed that she became scared on seeing her aunt outside Court. In concluding the drama that unfolded with this witness in Court, this Court asked the final question from this witness, as follows:

**Judge:** *I will just ask one more question. Just to clarify finally the Court needs to ask you how many people touched your vagina in this situation. Touched the place where you pass urine?*

*Ms. Archana:* *One person, My Lord.*

**Judge:** *Who is that person?*

*Ms. Archana:* *Prem Chand, My Lord.*

13. The second witness for the Prosecution (PW2) was **Dr. Acalina Rokoduru**. According to her, currently she is a lecturer at Fiji National University. She had graduated as a doctor in 2016 and worked as a medical officer thereafter. She confirmed that she examined the victim in this matter on 30/06/2022. She recognized the medical examination form of the victim and marked it as PEX2. She alluded that the victim was very calm when she came to her for examination, where she observed that her hymen was not intact with an old injury. She opined that the injury could have been due to penetration by a finger or a penis. She further mentioned that the injury observed on the victim was at 7 O clock position of the hymen. She also affirmed that this injury of the victim had occurred at least before 1 month of her examination due to the color of the wound.
14. In cross-examination, this witness stated that hymen of a female can tear due to any penetration. However, there should be some kind of penetration. She confirmed that she gave a statement to the police, nevertheless, she didn't remember conversing with the victim. However, referring to her statement, she agreed that she examined the victim in relation to sexually assault by her uncle. Further, this witness confirmed that the victim had denied any sexual activity or inappropriate touching.
15. In view of explanation given by the victim and doctor mentioning that she didn't converse with AL, this court would not consider the police statement of the doctor.

### **Evaluation of Prosecution Case**

16. The Prosecution case in this matter was entirely based on the evidence of the victim AL. In this regard, having explained the incident without any uncertainty in her evidence in chief and identifying the Accused on the dock in Court, this Court was impressed with the testimony of this witness and the manner she explained her startling experience. For this end, this Court witnessed the demeanor and deportment of this young girl and the unhesitant nature she answered the questions raised by the Prosecution.
17. However, this Court was surprised to witness the way she abruptly changed her story and went on to answer the narration made by the Defense counsel in question form as "Yes, My Lord" and accused another party unknown to the Prosecution. In this regard, to every narrative question of the Defense counsel the answer was the same. This suspicion was compounded when she informed Court that she feared her aunt whom she saw during the break and the aunt had told her to save Uncle Prem Chand when they moved to Narere. This Court had to give extra consideration of the possibility of AL changing her story during cross-examination due to her family influence, especially in the light of the mother

of the victim ignoring her complaint against her uncle Prem Chand compelling her to inform her schoolteacher of her grievance.

18. Noticing this vacillating testimony of the victim AL, followed by a degree of fathomable explanation in relation to influence by a family member, this Court was affirmed of the perpetrator by AL in answering last two questions raised by Court. In this regard, AL confirmed this Court that her uncle Prem Chand did the alleged sexual act to her.
19. In considering and accepting the evidence of the victim AL, this Court had to give due cognizance to **Section 41 (1) (d) of the Constitution of Fiji**, where it reads as follows:

*“41 (1) Every child has the right –  
(d) to be protected from abuse, neglect, harmful cultural practices, any form of violence, inhumane treatment and punishment, and hazardous and exploitative labor;”*

20. In this background, this Court also sought guidance from the pronouncement made by **Justice Thomas** of the **Wellington Court of Appeal of New Zealand** in the case of **R v H [1997]**<sup>i</sup>, where he stated, as below:

*“It is now widely acknowledged that the forces which cause a woman to hesitate before complaining are particularly powerful when the rape has occurred in a family situation, or the rapist is not a stranger. In such situations the pressure on the woman is acute. She may worry about destroying the family relationship, she may fear the reaction of her husband to the knowledge that she has been raped by another man, she may be confronted with hostility from other family members, she may fear that, because of the nexus between her and the rapist she will be disbelieved, she may be concerned that her own actions or behavior prior to the rape, less inhibited because of the family relationship or acquaintanceship with the rapist, will be construed as provocative, or she may suffer in an attenuated form any of the other forces which cause women to suppress an inclination to talk about their ordeal.”*



21. This Court perceives that the above detailed situation faced by females in complaining against a family member committing rape is further aggravated in this matter considering the young age of the victim and the indifferent approach taken by her mother to take further actions in relation to her daughter’s complaint of rape against her brother.

### **Finding of Court**

22. In analyzing the facts and circumstances unraveled in this matter, this Court has to highlight the importance of parents taking prompt action in relation to sexual abuse complaints received from their children, since any failure would expose the vulnerable children to undue social and psychological pressure and influences. This case demonstrated how pressure and influence could be experienced by a young child from her own family when the offender was a family member with close ties, where she was compelled to complain to her schoolteacher due to the apathetic attitude of the mother.



23. In considering the elements that need to be proved by the Prosecution for a conviction, the first element that needs to be proved is the identity of the Accused. In this matter the Accused is the maternal uncle of the victim whom she knew from her infancy and who lived with the victim during the time in issue. At the time of the incident in issue, victim AL had identified the Accused from the light on the ceiling of the next room to the room she was sleeping.
24. With regard to the second element, AL has testified in this Court that the Accused inserted his finger to the place where she urinates from and rubbed. This evidence has sufficiently established the second element. Further, the evidence of the doctor has confirmed that the hymen of the victim was not intact and she had an old injury at 7 “O” clock position of the hymen that could have happened by penetration by a penis or a finger before one month to her examination.
25. In this matter though the Accused is charged for penetrating the vulva of a 13-year-old girl with his finger, apart from the testimony of the victim stating that she is 14 years now, no other evidence was led by the Prosecution and no document was marked to confirm the age of the victim AL at the time of the offence. Further, defense did not challenge the age of the victim and attempt to establish that the victim was over 13 at the time of the offence. Therefore, in the absence of any other material, this Court is compelled to accept the age of the victim as stated by her in Court.
26. Therefore, by the operation of **Sub-section (3) of Section 207 of the Crimes Act of 2009**, the consent of the victim will not play any part in the adjudication of the culpability of the Accused in this matter. Considering these circumstances, this Court is convinced that the Prosecution has established the required elements to find the Accused guilty of the charged offence beyond reasonable doubt.
27. In the light of this position, this Court finds the Accused Prem Chand guilty of rape under **Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009**, as charged by the information.
28. You have 30 days to appeal to the Court of Appeal of Fiji.



Hon. Justice Dr. Thushara Kumarage

At Suva  
This 19 September 202

cc: *Director of Public Prosecution*  
*Legal Aid Commission*

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<sup>i</sup> [1997] 1NZLR 673