

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 135 of 2022

STATE

vs.

JOSEFATA KOROI

Counsel: Mr. M. Vosawale for the State
Ms. G. Henao for Accused

Dates of Hearing: 11th and 12th September 2023

Date of Closing Submission: 15th September 2023

Date of Judgment: 26th September 2023

JUDGMENT

1. The Director of Public Prosecution, by an Information filed on the 10th of May 2022, charged the Accused with one count of Indecently Insulting or Annoying any Person, contrary to Section 213 (1) (b) of the Crimes Act, two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Rape, contrary to Section 207 (1) (2) (b) of the Crimes Act. The particulars of the offences are:

COUNT 1

Statement of Offence

INDECENTLY INSULTING OR ANNOYING ANY PERSON:

Contrary to Section 213 (1) (b) of the Crimes Act 2009.

Particulars of Offence

JOSEFATA KOROI, on the 25th day of December 2021, at Samabula in the Central Division, intruded on the privacy of **ADI ATECA LIGATABUA** by showing his penis to her, offending her modesty.

COUNT 2

Statement of Offence

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

Particulars of Offence

JOSEFATA KOROI, on the 1st day of January 2022, at Samabula in the Central Division, unlawfully and indecently assaulted **ADI ATECA LIGATABUA** by forcefully kissing her on the mouth and sticking his tongue into her mouth.

COUNT 3

Statement of Offence

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

Particulars of Offence

JOSEFATA KOROI, on the 1st day of January 2022, at Samabula in the Central Division, unlawfully and indecently assaulted **ADI ATECA LIGATABUA** by forcefully licking and sucking her right breast.

COUNT 4

Statement of Offence

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

Particulars of Offence

JOSEFATA KOROI, on the 1st day of January 2022, at Samabula in the Central Division, penetrated the vagina of **ADI ATECA LIGATABUA** with his fingers, without her consent.

2. Consequent to the plea of not guilty entered by the Accused to these four counts, the matter proceeded to the hearing. The hearing commenced on the 11th of September, 2023 and concluded on the 12th of September, 2023. The Prosecution presented the evidence of two witnesses, including the Complainant. The Accused gave evidence for the Defence. The Court then heard the closing submissions of the learned Counsel for the Prosecution and the Defence. In addition to their respective oral submissions, the learned Counsel for the Prosecution and the Defence filed written submissions, which I properly took into consideration together with the evidence presented during the hearing and their respective oral submissions in making this Judgment.

Burden and Standard of Proof

3. 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

4. The main elements of the offence of Indecently Insulting or Annoying any Person are that:
 - i) The Accused,
 - ii) With the intention to insult the modesty of the Complainant,
 - iii) Exhibit his penis, intending it will be seen by the Complainant.

5. The main elements of the two counts of Sexual Assault are that:
 - i) The Accused,
 - ii) Unlawfully and indecently,
 - iii) Assaulted the Complainant.

6. The main elements of Rape as charged are that:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his fingers,
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his fingers,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his fingers in that manner.

7. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed these offences to the Complainant. There is no dispute about the identification. The Accused and the Complainant are known to each other.

8. Evidence of the slightest penetration of the vagina of the Complainant with the Accused's fingers is sufficient to prove the element of penetration.

9. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.

10. The Complainant must have the freedom to make a choice. It means she must not be pressured or forced to make that choice. Moreover, the Complainant must have the mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
11. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his fingers and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.

The Admitted Facts

12. The Accused tendered the following admitted facts pursuant to Section 135 of the Criminal Procedure Act.
 1. *The name of the person charged in this matter is **JOSEFATA KOROI** [‘Josefata’]*
 2. *Josefata is 44 years old and resides in Vatusui Road, Moto Sector, Ba.*
 3. *Josefata and the complainant are known to each other.*
 4. *The complainant is the wife of Josefata’s step-son.*
 5. *On the 1st of January, 2022, Josefata called the complainant to the kitchen of his house.*
 6. *The complainant went to Josefata in the kitchen.*

7. *There was kissing between Josefata and the complainant.*
8. *Josefata walked away from the complainant when he heard his wife approaching.*
9. *Josefata was arrested on the 23rd March, 2022 and was interviewed on the same date at 0930hrs.*
10. *Josefata was formally charged on the 24th March, 2022.*
11. *It is agreed that the admissibility of the following document is not in dispute and the same will be tendered by consent.*
 - a) *Photographic booklet dated 09th June 2022.*

The Prosecution's Case

13. The Complainant is the wife of the Accused's stepson. The Complainant and her Husband moved to the Accused's house in August 2021 with their children. On the 25th of December 2021, at around 2 p.m., the Accused walked into the living area while the Complainant was on the bed. The house is an open house. While walking, the Accused had shown the Complainant his penis and wiggled it. The Complainant had informed her husband about this incident when he came home that day. The husband had told her not to report it as the Accused was drunk then. However, they moved to a nearby house owned by her husband's aunt but still visited the Accused's home frequently as the new place was just a few meters away.
14. On the 1st of January 2022, while her husband was at work, the Complainant had gone to the Accused's house as the Accused came and took her daughter to his house. The Complainant then had breakfast with the Accused and then went to make her daughter sleep. The mother-in-law, the Accused's wife, went to visit a neighbour. The Accused then called

her to the kitchen. When she entered the kitchen, the Accused got hold of her and started to kiss her on her lips. He put his tongue into her mouth. The Complainant was leaning against the cupboard and could not push the Accused as he was heavy and big. The Accused then pulled her t-shirt up and started to suck her breast. Afterwards, he put his hand inside her underwear and penetrated her vagina with his fingers. The Accused only stopped it when he saw his wife was walking back home. He told the Complainant not to go anywhere and left the kitchen. The Complainant immediately messaged her husband, asking him to return home as she wanted to tell him something. The husband came home immediately upon receiving her message. The Complainant then related the matter to her husband and reported to the Police.

15. The Accused admitted that he kissed and touched the Complainant in the kitchen on the 1st of January 2022 but with her consent. He asked her if he could kiss her, to which she agreed. He then kissed her lips and then touched her body. However, she told him not to penetrate her vagina with his fingers as it was painful. Therefore, he did not put his hands inside her undergarment. He saw his wife walking back, so he stopped kissing her and walked away. Furthermore, the Accused testified that he never showed the Complainant his penis as she claimed on the 25th of December 2021, as he was at work at that time.

Evaluation of the Evidence

16. Given the evidence presented by the Complainant and the Accused and the admitted facts, the main contention in this matter is whether the Accused kissed the lips of the Complainant and then sucked and licked the breast forcefully without her consent. The Court then needs to determine whether the Accused penetrated the vagina of the Complainant with his fingers without her consent. The Accused denied the first count, saying he was at work then. However, there is no dispute between the parties that he called the Complainant to the kitchen on the morning of the 1st of January 2022 and then kissed her lips.
17. In view of the evidence presented by the Accused and the Complainant, it appears that the different versions of evidence presented by the Complainant and the Accused. In such

circumstances, the Court must consider the whole of the evidence adduced in the trial, including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed these crimes. The task of the Court is not to decide who is credible between the Complainant and the Accused. (*Liberato and Others v The Queen* ((1985) 159 CLR 507 at 515), *R v Li* (2003) 140 A Crim R 288, at 301, *Goundar v State* [2015] FJCA 1; AAU0077.2011 (the 2nd of January 2015),)

18. 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 give evidence. Therefore, such evidence presented by the Accused needs to be considered when determining the facts of this case.
19. 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."


20. Accordingly, if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. If the Court rejects the Accused'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.

21. I shall now proceed to evaluate the evidence with the applicable law. In doing that, the Court must first look into the credibility or the veracity of the evidence given by the witnesses and then proceed to consider the reliability or accuracy. 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 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).*
22. The Accused testified, stating that the behaviours of the Complainant were highly inappropriate. Being the head of the home, the Accused felt that she always behaved seductively and arousing, exposing her body and feelings towards him. He raised this issue with his wife and then spoke to the Complainant about her inappropriate manner, indicating his disapproval and concern. Paradoxically, the same person who disapproved of her such seductive and arousing behaviours took advantage of it when he found himself alone with her in the kitchen on the 1st of January 2022. As he claimed, he was the one who had asked her if he could kiss her on her lips. While trying to blame the Complainant for her unbecoming conduct, the Accused took advantage of it by asking her to engage with him sexually. The Accused failed to explain this paradoxical conduct of himself, making his evidence discredited and unacceptable.
23. The Accused claimed that the manner in which the Complainant behaved and the way she dressed suggested to him that she was consenting to sexual intimacy. However, he said in his evidence that he despised her conduct, warning her that he and his wife did not accept it. How a person dresses and expresses himself or herself through his or her conduct is part of a person's self-autonomy and identity, which could not be considered in determining the fourth element of Rape.

24. Considering the above reasons, I find the evidence of the Accused is not true. Moreover, the Accused failed to create any doubt about the Prosecution's case.
25. The Complainant specifically stated that the Accused walked into the living room while she was seated on the bed. He then showed her his penis and wiggled it before he put it back. He was drunk. She told her husband about this incident the same night, and they moved to another nearby place after the incident. A few days later, the second incident occurred in the kitchen when the Complainant was at the Accused's house, making her daughter sleep. The Complainant had promptly and spontaneously informed her husband about these two incidents soon after they occurred. The Complainant testified in her evidence that she felt uncomfortable telling her husband about the second incident when his mother was around. Thus, she asked him to go out for her to tell him about the incident. This evidence indicates that she was uncomfortable telling her mother-in-law about this incident and opted to relate it to her husband promptly.
26. The husband of the Complainant gave evidence confirming that she informed him about the first incident on the night of the same day. Regarding the second incident, he testified that he received a message during the day while he was at work. He had immediately returned home, and then the Complainant related what the Accused did to her. The husband's evidence is considered evidence of a recent complaint, which enhances the credibility and reliability of the evidence given by the Complainant.
27. I observed the manner in which the Complainant gave evidence in Court. She was consistent, coherent and precise in giving her evidence. Considering how she gave evidence with the above-discussed reasons, I find her evidence credible and reliable; hence, it is the truth.
28. I, accordingly, find the Prosecution successfully proved beyond reasonable doubt that the Accused committed these four offences as charged in the Information. Therefore, I hold the Accused guilty of one count of Indecently Insulting or annoying any person, contrary to Section 213 (1) (b) of the Crimes Act, two counts of Sexual Assault, contrary to Section 210

(1) (a) of the Crimes Act and one count of Rape, contrary to Section 207 (1) (2) (b) of the Crimes Act and convict of the same accordingly.




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

At Suva

26th September 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.