

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 63 of 2019

STATE

V

AMITESH PRASAD

Counsel : Mr. S. Seruvatu for the State.
: Mr. R. Charan and Mr. S. Singh for the Accused.

Dates of Hearing : 13, 14, 15, 16 February, 2023

Closing Speeches : 20 February, 2023

Date of Judgment : 20 February, 2023

JUDGMENT

(The name of complainant is suppressed she will be referred to as "R.C")

1. The Director of Public Prosecutions charged the accused by filing the following amended information dated 10th February, 2023:

FIRST COUNT

Statement of Offence

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

ELEMENTS OF THE OFFENCE

RAPE

5. To prove the first count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant "R.C" with his finger;
 - (c) "R.C" was below the age of 13 years.
6. The slightest of penetration of the complainant's vagina by the accused's finger is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case, the complainant was 11 years at the time of the alleged offending and therefore the consent of the complainant is not an issue in regards to this count.
7. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
8. The second element is the act of penetration of the complainant's vagina with the finger.
9. The final element of the offence is the age of the complainant. It is an undisputed fact that the complainant was 11 years in 2019 which establishes that she was below the age of 13 years at the time of the alleged incident.
10. In this trial, the accused denied committing the offence of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt

act has some elements of indecency that any right minded person would consider such conduct indecent.

16. The final element of assault is the unlawful use of force on the complainant by rubbing her vagina with his finger.

In this regard this court has to consider:

- (a) whether the force used in rubbing the complainant's vagina was sexual in nature; and
- (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.

17. In this trial, the accused has denied committing the offence of sexual assault. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by rubbing her vagina with his finger.

18. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offence of sexual assault as explained above, then this court must find the accused guilty. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then this court must find the accused not guilty.

INDECENT ASSAULT

19. To prove the second count the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:

corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

26. In this trial, the prosecution and the defence have agreed to certain facts titled as amended admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
27. For completeness the admitted facts are reproduced herewith:
1. *The complainant in this matter is "RC", 11 years old, student of Valemasima, Votualevu, Nadi at the time of the alleged offence.*
 2. *The accused in this matter is Amitesh Prasad, 24 years old, bus driver of Votualevu, Nadi at the time of the alleged offence.*
 3. *On the 20th of March 2019, the complainant and her brother, Raheel Chand did not go to school and were allowed to stay home by their mother, Morishma Devi Lal.*
 4. *At about 3.30 pm on the 20th of March 2019, the complainant decided to go to Shop N Save Supermarket, Votualevu, Nadi which was opposite their junction.*
 5. *As the complainant was walking towards Shop N Save Supermarket, she saw her brother, Raheel Chand standing beside a Westbus bus registration number BA 888 and walked towards him. As she*

30. The complainant did not know the name of the bus driver but he was commonly called by the name "Monkey". The accused invited Raheel and the complainant for a joy ride in the bus, both agreed and got in the bus. The complainant and Raheel were the only passengers in the bus.
31. The complainant went and sat in the last seat at the rear end of the bus while Raheel sat on the seat behind the accused. After the bus ride was over the accused stopped the bus at the place where the complainant and her brother had boarded the bus. Raheel got off first and as the complainant was getting off the bus at the step the accused held the complainant's hand and said "*just keep quiet don't shout otherwise I will kill your mum and dad*" and drove the bus.
32. The complainant got scared and sat on the seat behind the driver, the complainant could not get off the bus because it was in motion. The complainant asked the accused where he was taking her the accused replied to the bus garage to drop her there but instead the accused drove the bus to Savalau near the river.
33. At Savalau the accused grabbed the complainant and pulled her out of the bus and took her to a small hill where he made her lie down. The accused then squeezed the complainant's breast by putting his hand inside her clothes. The complainant could not recall what she was wearing at the time, however, she told the accused "*don't touch it and move away.*"
34. The complainant further stated that with his other hand the accused put his hand inside her panty and started rubbing his finger on her vagina. The complainant explained "*his fingers going around, round it feel like rubbing his finger.*" This was painful so she started crying. According to the complainant she was getting a burning sensation. Thereafter the

38. The complainant agreed that she told the police officer the above and the version she told the police was the correct one. The complainant stated that she had never been to the place where she was taken by the accused and there were no houses nearby. The hill where the complainant was lying had grass but she was not able to recall whether her clothes had become dusty or had grass stains on it.
39. When it was suggested to the complainant that it was not possible to bite the hand of the accused in the manner described by her when the accused hand was inside her clothes the complainant explained "*he put his hand through the side and while he was fondling them his hand was under my chin I push his hand up and bit it.*"
40. Again the complainant explained when it was suggested that to touch her breast the accused had to move her bra upwards the complainant said the accused had touched her breast from the side of her bra. The complainant was not able to remember which side of her breast was fondled, however, when it was suggested that she was lying because she was unable to recall which side of her breast was fondled the complainant stated that she is telling whatever little bit she could remember.
41. The complainant denied lying in court and that nothing had happened. After lodging her report at Namaka Police Station she was taken to the Nadi Hospital for a medical examination. The complainant denied accompanying the accused to the West bus garage. She also denied asking for compensation from the accused, the complainant maintained that the accused was rubbing her vagina when asked did the accused finger go inside her vagina. The complainant said it was the finger nail that had gone little bit inside her vagina that caused pain but not fully inside.

From the police station the witness went to the Nadi Hospital with the complainant.

48. In cross examination the witness stated that the complainant told her that she went in the bus driven by the accused and near a bridge the accused took her and put his hand inside her undergarments and touched her breast. According to the witness when she took the complainant to the Namaka Police Station she observed that the complainant was in discomfort and pain but was not crying.
49. Upon further questioning the witness stated that she did not approach anyone to reconcile or settle the matter, according to the witness it was the accused parents and cousins who wanted to have the matter withdrawn after payment of some money. The witness denied that she was involved in seeking a monetary sum to withdraw the matter.
50. In re-examination the witness clarified that the complainant was in discomfort and pain meant the complainant was saying that she was having pain in her vaginal area and was feeling uneasy. When she first saw the complainant near black rock she saw the complainant was frightened.
51. The witness also stated that she did not ask for money from the accused parents to withdraw the matter. According to the witness the accused parents and cousins had offered \$1,000 but the witness did not agree to anything.
52. The fourth witness Dr. Shariya Singh informed the court that she graduated with an MBBS degree from the Fiji National University in 2017.

which were consistent with her findings. The witness agreed the redness seen could have been as a result of rubbing against the skin.

58. As for the hymen being intact the touching or rubbing or putting fingertip in the vagina would not rupture or break the hymen. By mentioning no evidence of penetration the witness meant there was no penis penetration or any object had entered the vagina which would have caused rupture or stretching of the hymen. The witness also clarified it was not possible to say medically that there was a fingertip penetration and if a fingertip did penetrate the vagina it would be difficult to say whether that would have caused the redness.
59. In cross examination the witness stated that there was rubbing involved and nothing about insertion of finger into the vagina. The witness also agreed that the redness seen could be self-inflicted by itching or feeling or rubbing that particular area.

DIRECTION ON EXPERT EVIDENCE

60. This court has heard the evidence of Dr. Singh who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.
61. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my

then to the supermarket where he had picked the complainant and her brother.

67. Raheel got off but the complainant did not so the accused told her to get off the bus. The complainant told the accused that she will get off at Nadi bus stop because her mother was waiting for her. Again the accused told the complainant to get off since he was going to the service station to refuel the bus. However, the complainant hid where she was sitting.
68. The accused drove to Namaka Total Service Station then to the Nadi Bus Stand for his 5pm trip since he was getting late he took the shorter route through Nadi back road. When he reached Nadi bus stand it was 4.50 pm he did not get a space so he went around the ground and came back at 5pm at the bus stand.
69. The accused was able to board passengers for his trip to Votualevu, Malawai and Carreras. The complainant was still in the bus after he finished this trip he went to the bus garage. The accused said that during the final leg of his trip the accused asked the complainant why she didn't get off.
70. The complainant didn't say anything so he gave his phone to the complainant to call her mum. The accused was not sure whether the complainant had called her mum or not but she returned his phone. After getting his phone he then drove to the bus garage and before entering the garage he again told the complainant to get off the bus. The complainant did not get off so he told the watchman Inia that a girl was sitting in the bus who does not want to get off.
71. The accused again went into the bus and told the complainant to get off she told him that her mother is coming to pick her. Upon hearing this he

the witness started work at around 6pm the accused drove a bus registration no. HAQ30 into the garage.

77. After parking the bus the accused informed the witness that there was a young girl in his bus. The witness went and saw a girl seated in the bus. The witness went back and told the accused to go and drop the girl to the place where he had picked her. The witness does not know the girl and he had never seen the girl before.
78. The witness also stated that he told the accused that whatever had happened was probably against the law. The accused left the garage with Kalavo in Kalavo's car.
79. In cross examination by the state counsel, the witness was referred to his police statement dated 23rd March, 2019. The witness stated that his police statement was not read back to him, however, he agreed that it is not written in his police statement that the witness had a conversation with the accused for the accused to take her back to the place where the accused had picked her. The witness maintained that there was a little girl seated in the bus driven by the accused to the bus garage.

PREVIOUS INCONSISTENT STATEMENT

80. This court directs its mind to the fact that the defence counsel during cross examination of the complainant and the state counsel in the cross examination of Inia Vakaruru (defence witness 2) had questioned these witnesses about some inconsistencies in their police statements which they had given to the police when facts were fresh in their minds with their evidence in court.

bus registration no.'s HAQ30 and CW888. After work the witness, the accused and one friend of the witness went home in the company bus.

86. In cross examination the witness agreed he did not know if the accused had made all the trips he was required to make that day. The witness also agreed if the accused had taken the bus to Savalau he would not know and if the accused had made the call from Savalau he would not know. The matter was not reported to the police because the accused had told the witness that the girl's parents were coming to pick her. According to the witness the accused had not told him that the girl did not want to get off the bus.
87. The final witness Chattar Pal Prasad the father of the accused informed the court that he was approached by one Timaima to settle this matter. The witness knows Timaima but he was not at any time approached by the complainant's mother regarding the matter. According to the witness he had received an offer from Timaima but he did not give anyone any money.
88. In cross examination the witness stated that the accused is his eldest son and he would do anything to protect him but he won't lie for his son and will speak the truth. The witness agreed that Timaima is related him, however, upon further questioning the witness changed his position to say that he just knows Timaima who is not married to any of his cousins.
89. The witness denied that he had sent Timaima to the complainant's mum and step father and had offered to give \$1,000.00 to withdraw the matter. When it was suggested that he had also proposed to the complainant's mother that the accused and the complainant get married the witness said he did not say this since he does not know the complainant's parents.

her chin and bit the hand of the accused between the thumb and the index finger.

95. The accused said "*ouch*" pushed the complainant and then went to the bus and drove off. It was getting dark so the complainant started walking home. Before reaching home the complainant met her step father she was so scared of her step father that she did not tell him about what the accused had done to her. Shortly after the complainant's mother came and took the complainant to the Namaka Police Station. The complainant was medically examined at the Nadi Hospital the same day, the medical findings of the doctor was of recent injury and reddening around the perineum which was consistent with rubbing.
96. On the other hand, the defence says the allegations are baseless and a made up story by the complainant. The accused did not do anything to the complainant as alleged how could he have done so when he did not go to Savalau. The complainant lied in court when she narrated an incident that was not possible and/or probable. The complainant lied to her step father when she met him by saying that she was kidnapped by someone.
97. In this saga the complainant is not alone the mother of the complainant is also part of the concocted story. The mother of the complainant with the help of her neighbour Timaima had made approaches to the parents of the accused with the view to extort money from them. This mission failed after the accused father refused to be sucked into this ploy.
98. The defence submits that the accused being a responsible bus driver had safely driven the complainant to the bus garage after she refused to get off the bus saying that her mother will come and pick her from the garage. The watchman of the garage had also seen a girl sitting in the bus. The

had also demonstrated the same on the wooden plank of the witness stand by moving her finger round and round to express her point of what had happened.

104. Furthermore, the doctor also confirmed that the reddening seen in the perineum was likely to be as a result of rubbing and that there was no conclusive evidence to suggest any intrusion into the vagina.
105. There was an inconsistency between what the complainant told the court and her police statement. However, the age of the complainant at the time and passage of time are crucial in this regard
106. The inconsistency or omission between her evidence in court and her police statement was not significant to adversely affect the credibility of the complainant. The complainant was not shaken as to the basic version of her allegations. She was consistent in her evidence as well.
107. The Court of Appeal in *Mohammed Nadim and another vs. State [2015] FJCA 130; AAU0080.2011 (2 October 2015)* had made the following pertinent observations about the above at paragraph 16 as follows:

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoqinbhai Hirjibhai v State of Gujarat (supra):

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot

was not discredited. The complainant was steadfast in what the accused had done to her.

110. I accept that the complainant had lied to her step father about being kidnapped by someone. In my considered judgment this reaction by the complainant cannot be taken in isolation the circumstances of the complainant is an important consideration in this regard.
111. It is not expected of an 11 year old girl who has just had an unexpected sexual encounter to tell the first person she meets everything about what had happened to her. I also accept that the step father was strict on the complainant and that she was afraid of being assaulted by the step father which was another fear the complainant had at the time. The failure by the complainant to tell her step father anything about what she had undergone does not affect her credibility at all.
112. Furthermore, experience has shown that individuals differ in terms of how they react towards people after an unexpected happening to him or her. Some display obvious signs of distress and some not. The fact that the complainant did not tell anything to her step father about what the accused had done to her does not mean that she was a liar and she should not be believed. The circumstances of the complainant ought to be considered holistically. It cannot be ignored that the complainant was a child of 11 years at the time who was oblivious to an unexpected conduct by the person she knew.
113. Another aspect of this trial is that during cross examination of the complainant's mother it was revealed that the complainant had told her mother that the accused had taken the complainant to Savalau in the bus and had touched her breast and put his hand inside her undergarments.

119. I accept that whatever the complainant told her mother Morishma was enough to alert Morishma that something wrong had happened to her daughter. There is no legal requirement that a complainant is supposed to tell every detail of what he or she has encountered to the person complained to.
120. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. It is not expected that a child of 11 years or anyone for that matter who has had an unexpected sexual encounter to give every detail of the accused unlawful sexual conduct to the person the complaint is relayed to.
121. In this case Morishma was relayed crucial information that the accused had touched the complainant's breast and had put his hand inside her undergarments. I also accept the observations of Morishma that the complainant was frightened, distressed and complaining of pain in her vagina. This is also what the doctor had observed of the complainant upon her initial impression of the complainant as well.
122. The Supreme Court in *Anand Abhay Raj vs. The State, CAV 0003 of 2013 (20th August, 2014)* at paragraph 39 made an important observation about the above as follows:

The complainant need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.

fetches. I also do not accept that the complainant did not want to get off the bus.

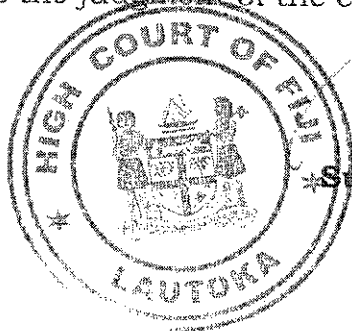
128. The accused did not tell Inia the watchman that the mother of the complainant will be coming to pick her daughter. What the accused told Inia was that the girl did not want to get off the bus? On the basis of all of the above the only inescapable conclusion that can be drawn is that the accused did not tell the truth in court but made up stories as he narrated his evidence in court.
129. The evidence by Inia and Anish is also doubtful and far from truth. If there was indeed a little girl in the bus as mentioned by Inia then I am sure both these witnesses would have been keen to probe further into what this young passenger was doing in the bus alone late in the afternoon going into evening.
130. Although Anish was only narrating what he was told by the accused still it was obvious to me that both Inia and Anish were not telling the truth and appeared to be withholding information. If there was indeed a little girl in the bus I am sure Inia would have been probing or try and locate the girl's parents. I reject the evidence of Inia and Anish as not believable.
131. I also do not accept that the allegations were made up by the complainant and her mother to extort money from the accused parents. I accept the evidence of Morishma that she was not involved in any way in extorting money from the accused parents. On the totality of evidence I can say that the issue of extortion raised by the defence was to divert attention away from the allegations.
132. It is trite that in criminal matters the prosecution witnesses including a complainant do not decide whether a complaint is to be withdrawn or not.

unlawfully and indecently assaulted the complainant by rubbing her vagina with his finger.

138. This court is also satisfied beyond reasonable doubt that the accused on 20th March, 2019 unlawfully and indecently assaulted the complainant by squeezing and/or touching her breast. In respect of the above two offences of sexual assault and indecent assault this court is also satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse, in what he did to the complainant. The acts of the accused have some elements of sexuality and indecency that any right minded person would consider such conduct sexual and indecent in nature.

139. In view of the above, I find the accused not guilty of one count of rape and he is acquitted accordingly, however, I find the accused guilty of the lesser offence of sexual assault and he is convicted accordingly. For the second count of indecent assault the accused is found guilty and he is convicted as charged.

140. This is the judgment of the court.



Sunil Sharma
Sunil Sharma
Judge

At Lautoka
20 January, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Ravneet Charan Lawyers for the Accused.