

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

Criminal Case No. HAC 22 of 2023

BETWEEN: STATE

AND: DHIREND CHANDRA

Counsel: Ms. M. Lomaloma for the State
Mr. A. Kohli for the Accused

Date of Trial: 18th and 19th October 2023

Date of Judgment: 9th February 2024

JUDGMENT

1. The complainant has been granted name suppression therefore any public record of these proceedings will not contain any information that may lead to the identity of the complainant.
2. The Accused is charged with the following offences on the Information: -

**INFORMATION BY THE
DIRECTOR OF PUBLIC PROSECUTION**

DHIREN CHANDRA is charged with the following offences:

[COUNT 1]

Statement of Offence

INDECENT ASSAULT: contrary to section 212 (1) of the Crimes Act 2009.

Particulars of Offence

DHIREN CHANDRA sometimes between the 1st day of January 2016 and the 31st day of December 2016 at Vunivau, Labasa in the Northern Division, unlawfully and indecently assaulted **AHT** by kissing her on the mouth.

[COUNT 2]

Statement of Offence

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

Particulars of Offence

DHIREN CHANDRA sometimes between the 1st day of January 2019 and the 31st day of December 2019 at Vunivau, Labasa in the Northern Division, unlawfully and indecently assaulted **AHT** by fondling her breasts.

[COUNT 3]

Statement of Offence

INDECENT ASSAULT: contrary to section 212 (1) of the Crimes Act 2009.

Particulars of Offence

DHIREN CHANDRA sometimes between the 1st day of January 2019 and the 31st day of December 2019 at Vunivau, Labasa in the Northern Division, unlawfully and indecently assaulted **AHT** by touching her clothed vulva

[COUNT 4]

Statement of Offence

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

Particulars of Offence

DHIREN CHANDRA sometimes between the 1st day of January 2021 and the 31st day of December 2021 at Vunivau, Labasa in the Northern Division, unlawfully and indecently assaulted **AHT** by rubbing his penis on her vulva.

[COUNT 5]

Statement of Offence

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

Particulars of Offence

DHIREN CHANDRA sometimes between the 1st day of January 2022 and the 31st day of December 2022 at Vunivau, Labasa in the Northern Division, unlawfully and indecently assaulted **AHT** by rubbing his penis on her vulva

[COUNT 6]

Statement of Offence

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

Particulars of Offence

DHIREN CHANDRA sometimes between the 1st day of January 2022 and the 30th day of June 2022 at Vunivau, Labasa in the Northern Division, penetrated the mouth of **AHT** being a child under the age of 13 years.

3. The Accused was first produced in Labasa Magistrate's Court on the 21st of February 2023. He was bailed and was issued with an interim DVRO and the file was then transferred to the High Court. He was represented by counsel from the first day.
4. He was arraigned before the High Court on the 3rd of March 2023 and after the Information and Disclosures were served, he entered a Not Guilty plea to all 6 counts on the 23rd of May 2023.

5. The matter was then adjourned for the PTC, with the parties filing the Agreed Facts on the 21st of July 2023

Agreed Facts

6. The parties have agreed that the following acts are admitted and pursuant to section 135 of the Criminal Procedure Act 2009, do not need to be established by further evidence, as follows: -
 - (a) The complainant in this matter is **AHT**.
 - (b) The complainant was born on the 12th of September 2009.
 - (c) The Accused in this matter is **DHIREND CHAND** and his identity is not disputed.
 - (d) The Accused is the complainant's step father.
 - (e) The Accused lived together with the complainant's mother and their children including the complainant.
7. The matter was then fixed for trial from the 18th and 19th October 2023.
8. At the Trial the State only called the complainant AHT and at the request of the defence they also called WPC 4892 Taina to be cross examined. The State tendered the complainant's birth certificate as an Exhibit P1.
9. The Accused testified under oath and he also called Acting Inspector Alipate Koli, Station Officer, Labasa Police Station and Surendra Prasad, mechanic of Bulileka.
10. The following exhibits were tendered for the defence: -
 - (a) Domestic Violence Restraining Order (Standard Non Molestation Conditions) issued for Maria Urusula Bera dated 6th December 2022 – Exhibit D1.
 - (b) Notice to Vacate issued to Maria Urusula Bera dated 5th December 2022 – Exhibit D2.
 - (c) Confirmation of Police Report lodged by Dhirend Chand dated 15th September 2022 – Exhibit D3.
 - (d) Letter from Labasa Police Station dated 31st October 2022 informing him that his report has been classified as trivial – Exhibit D4.

- (e) Progress report from Labasa Police Station addressed to Dhirend Chandra relating to Report number CR 15/8/22 – Exhibit D5.
- (f) Police Statement of Dhirend Chandra dated 21st September 2022 – Exhibit D6.

The evidence for the State

- 11. In her evidence, AHT testified that she was born on the 21st of September 2009, she is currently 14 years of age, attending Bethel Primary School in Year 8. Her mother is Maria Urusula Bera, and her father is Lusio Tauvoli. She has 7 siblings, and she is the 6th eldest of the siblings.
- 12. She currently lives in Namara with her mother, her sister and two brothers.
- 13. Her youngest sibling is her sister Jennifer Chandra and the second youngest is Dhirend Chandra junior.
- 14. Previously she lived in Vunivau with her mother, her siblings and her stepfather, the Accused person. She called him Papa and she had known him as her stepfather since she was a young child.
- 15. She testified that in 2016 when she was in Class 1 she recalls that once he called her into his room, told her to take off his shirt and he then kissed her on her lips. Apart from what the Accused did to her, she did not recall anything else – what time this alleged incident happened? Whether he told her anything before he kissed her? Whether it happened in the day or night? She does recall that when this happened, she knew that it was wrong, and he didn't like the way he did it.
- 16. She did not tell anyone of the first incident. This first incident happened in a house they were renting at Qawa Triangular, Labasa.
- 17. Later they moved to live with the Accused's mother Lila Wati at her home in Vunivau.
- 18. She testified that in 2019, she was in Class 4 and she was 10 years of age.
- 19. She testified that on a date she cannot recall, at night, she was sleeping in the same room as the Accused. He had his own bed while AHT slept in a double bunk un the same room.

She slept on the lower bunk with her sister Jennifer while her brother Dhirend junior slept on the upper bunk.

20. As she was just going to sleep, the Accused came and held her breast above her t shirt. He held both breasts in his hands.
21. In 2019 as well, the Accused rubbed his penis on her vulva. This incident happened in her room in the house at Vunivau. AHT could not recall what time the incident happened, day or night. She recalled that she was cleaning the room, the Accused came into the room, told her to lie down and he took off her clothes. The Accused also took off his clothes and he came on the bed and rubbed his penis on her vulva. He did this for a while and she did not like what he was doing. He then put on his clothes and left the room. She testified that the Accused did this on a lot of occasions as well, sometimes in the sitting room, sometimes in his room, however she could not recall how many times this happened.
22. She then testified that in December 2022, she was in Class 7 and they were still staying at the house in Vunivau. At the time in question, she was sleeping on the lower bunk with her sister Jennifer, while her younger brother was asleep in the upper bunk.
23. As she was sleeping in the lower bunk, he came in took out his penis and placed it inside her mouth. He told her he loved her, she tried to push him away, but he kept coming forward. He put it inside her mouth, and he then put on his pants and left the room.
24. On this occasion, she told her mother on her birthday, the 21st of September 2022. She told her mother about all the things that the Accused did to her. Her mother then reported the matter to the Police. The Police came the same day and spoke to her mother and her mother then took her to the Police Station the next day.
25. When these incidents happened, the complainant's mother was away working at the Old People's Home.
26. Under cross examination, the complainant could not recall the relevant dates and most of her responses to learned counsel were "I don't know, or I can't recall."
27. The second witness was a prosecution witness that was made available to be cross examined, WPC 4892 Taina.

28. In cross examination she confirmed that she had been in the Police Force for 10 years and she has spent 2 years in the sexual offences unit. She confirmed that allegations of sexual assault on children are taken very seriously by the Police.
29. She interviewed the Accused under caution, and he denied all of the accusations against him. She confirmed that she did not complete his interview as her superiors directed the she conduct further inquiries. The interview was suspended for 6 weeks and he was then formally charged after 3 months.
30. That was the State's case.
31. The Accused elected to give evidence under oath, and he also called one witness.

The evidence for the Accused

32. Dhirend Chand testified that he is a Stores Officer employed by the Ministry of Agriculture. He was married in 2000 to Roshni Devi and he has three children with her. In 2010 he began a relationship with Maria Bera and from that relationship he has two children. At the time Maria Bera was also married but her husband was in New Zealand and they lived together from 2010. She had 5 children with her husband and they have two children together.
33. He testified that in 2014 they were renting at Qawa Triangular at Mrs. Nitya Nand's house. They rented from January 2014 till the last week of December 2015. She stayed there with Maria Urusula Bera and the 5 children, including her son Dhirend junior. At that time, she was not working. She started working in 2019 although from 2015 she was selling fish from the riverside at Labasa town.
34. He denied that he was staying in Cawaira in 2016 and in 2017 they moved to rent a house at Vunivau belonging to Mrs. Kamala Wati. They stayed there in 2017 and in 2018 they moved to another house belonging to Ramesh Chand.
35. In 2019 he was staying with Maria and the children, although he returned to live with his mother when his wife left his mother's home. Maria and the children remained behind at the rented house and he used to come and go between his mother's house and Maria and the children.

36. He denied all the allegations made by the complainant. He denied that there was a bunk bed inside his room. Instead he stated that he had one room, his son from his marriage had his own room, his mother had her own room and the other children slept in the dining room in the double bunk while the other two children slept in the sitting room.
37. He denied doing any of the things alleged by the complainant in her evidence. He maintained this under vigorous cross examination by State counsel.
38. The second witness was Acting Inspector Alipate Koli, the Acting Station Officer of Labasa Police Station. He testified that on the 21st of September 2022 one Dhirend Chandra reported that his wife was causing trouble to him that same afternoon, he reported at 8:25pm.
39. His statement was recorded that same day and he tendered the report and statement into Court as a defence exhibit.
40. The last witness was Surendra Prasad, mechanic of Bulileka, Labasa.
41. He testified that he knows Dhirend Chandra that he came to rent his house in 2015 in December and he finished in January 2017.
42. He stayed there with his wife and all of his children, 8 children.
43. That was the evidence for the Defence.

Analysis

44. The Accused was charged with 2 counts of Indecent Assault contrary to section 212 (1) of the Crimes Act, 3 counts of Sexual Assault contrary to section 210 (1) (a) and Rape contrary to section 207 (1) 2 (c) and (3)
45. For count 1 - The State has to establish that on a date between 1st January to 31st December 2016 – Dhirend Chandra unlawfully and indecently assaulted AHT by kissing her on her mouth.
46. For count 2 – the State has to establish that on a date between 1st January 2019 to 31st December 2019, the Accused Dhirend Chandra, unlawfully and indecently assaulted AHT by fondling her naked breasts.

47. For Count 3 – the State has to establish that on a day between 1st January 2019 to 31st December 2019, the Accused Dhirend Chandra, unlawfully and indecently assaulted AHT by touching her clothed vulva.
48. For Count 4 – the State has to establish that on a day between 1st day of January 2021 and 31st December 2021, Dhirend Chandra, unlawfully and indecently assaulted AHT by rubbing his penis on her vulva.
49. For Count 5 - the State has to establish that on a day between 1st day of January 2022 and 31st December 2022, Dhirend Chandra, unlawfully and indecently assaulted AHT by rubbing his penis on her vulva.
50. For Count 6 – the State has to establish that on a day between the 1st day of January 2022 and 31st December 2022, Dhirend Chandra, penetrated the mouth of AHT with his penis, AHT at the time was a child under the age of 13 years.
51. The State bears the legal burden of establishing all of the 6 counts beyond a reasonable doubt. At no stage did this burden shift to the Accused therefore he is not required to establish his innocence.
52. The State called only one witness – the complainant AHT. She was not an impressive witness. She was vague on the dates and all other surrounding contextual facts for each count however she was clear about the relevant facts for each count.
53. The Court is well aware of the passage of time and the impact this will have on the recollection of specific events and time.
54. Studies have also shown that people subjected to trauma will often block out the memories of horrific incidents as a safety mechanism. However for the complainant to not even recall whether the alleged incident happened in the day or night and the month or day of the week, goes against her credibility.
55. For the first count, the Accused has provided evidence that the complainant’s mother was actually in the house at the time the alleged incident occurred as she did not start working at the Old People’s Home till 2019. This affects the time and opportunity for the Accused to have committed the first count.


56. With respect to the other Counts, reasonable doubts have been raised with respect to where they were actually staying at the relevant times and whether they were actually staying together or not.
57. That being the case, I find that the Accused has successfully raised reasonable doubts as to the credibility of the State's only witness thereby raising a reasonable doubt with respect to all 6 counts.
58. That being the case, the reasonable doubts raised will be in favour of the Accused and he is acquitted of all counts against him.

This is the Ruling of the Court: -

1. **Dhirend Chand for the 6 counts against you in this Information – 2 counts of Indecent Assault; 3 counts of Sexual Assault and 1 count of Rape – you are acquitted, you are free to go.**
2. **Your bail is revoked**

30 days to appeal




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Mr. Justice U. Ratuveli
Acting Puisne Judge

Solicitors:

Director of the Public of Prosecutions for the State
Kohli & Singh for the Accused