

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

**CRIMINAL CASE NO: HAC. 90 of 2014**

**STATE**

**v.**

**AVITESH RAM**

**Counsel:** Ms. S. Lodhia & Mr. E. Samisoni for State  
Ms. L. Raisua for Accused

**Dates of Hearing:** 22<sup>nd</sup>, 23<sup>rd</sup> and 24<sup>th</sup> February 2016

**Date of Summing Up:** 25<sup>th</sup> February 2016

**Date of Judgment:** 26<sup>th</sup> February 2016

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**JUDGMENT**

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1. The accused is charged with the following offences:

**FIRST COUNT**

*Statement of Offence*

**INDECENT ASSAULT:** Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**AVITESH RAM** on the 15<sup>th</sup> March 2013 at Suva in the Central Division, unlawfully and indecently assaulted a girl, namely, **JOSEPHINE ASHWIN CHAND**.

## SECOND COUNT

### *Statement of Offence*

**RAPE**: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009

### *Particulars of Offence*

**AVITESH RAM** on the 15<sup>th</sup> March 2013 at Suva in the Central Division penetrated the vagina of a girl, namely, **JOSEPHINE ASHWIN CHAND**, with his fingers, without her consent.

2. After trial, three assessors unanimously opined that the accused is guilty of Count No. 1 and not guilty of Count No. 2. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at the trial.
3. The prosecution called the complainant Josephine Chand, complainant's mother Seshli Kumari and the brother-in-law of the accused Vinay Kamal Singh to give evidence. On behalf of the defence the accused gave sworn evidence and also his sister Kusbhu Lata and the mother Shabnam Lata gave evidence.
4. It is an agreed fact that the complainant was residing at the accused's mother's house. It was evident that the accused too was residing there.
5. The evidence of the complainant was that on 15<sup>th</sup> March 2013 the accused came home late that night drunk. When she was sleeping in the bedroom, accused had come and touched her breasts, chest, and private part and also had poked his fingers into her vagina. She had not agreed to that and had shouted. No one had come for help and at one time

mother of the accused Shabnam had come and pushed the accused on to her again and had sworn at her.

6. The following day the complainant had informed her grandmother who was residing the next door in the same building and also informed her mother. The mother of the complainant also giving evidence confirmed that the complainant informed her of what the accused did to her.
7. Although the complainant's mother was informed the following day, the unchallenged evidence was that she could not immediately attend to the complainant as she had a Domestic Violence Restraining Order (DVRO) against her on a complaint made by her daughter who is the complainant in this case.
8. After getting the DVRO cancelled, she had accompanied the complainant to report the matter to the police station. I find that the complainant Josephine was consistent in her evidence. I am satisfied that the complainant correctly identified the accused when he committed the sexual acts on her inside the bedroom. It had happened for about 20 minutes and there had been sufficient light to identify the accused who had been living in the same house.
9. The accused in his evidence said that Josephine was not at their home. It is an agreed fact that Josephine was living in that house.
10. The mother of the accused also in her evidence clearly said that the complainant Josephine was living in her house with her, Ashant his son who was 6 years old and the accused. The complainant had been there in her house for 2 weeks. It is also an agreed fact that Josephine was

living in that house. I find that the accused lied in court when he said that Josephine was not living in that house and also he did that to get away from the charge.

11. Witness Kusbhu also said that she did not see Josephine at her mother's house. Her evidence was that the accused was taken by her to her place and therefore at the time alleged crime was to have committed the accused was with her in her house.
12. However, her husband Vinay Kamal said that he and his wife were asked to give a false statement to police by Shabnam, the accused's mother stating that the accused was with them. He had refused to make a false statement to police.
13. Kusbhu in her evidence admitted that she told the police that Shabnam, her mother wanted her to make a false statement to say that Avitesh was with her in her house. However, she says that she gave that statement to police because her husband Vinay forced her. She had given that statement to police in December 2013. However, the defence also took up the position that Kusbhu was separated from her husband in December 2013 and that was why Vinay her husband made the statement to the police against Kusbhu for making a false statement.
14. Complainant Josephine was consistent in her evidence. I find her to be truthful when she said that the accused touched he breasts, chest, and private part and also poked his fingers into her vagina for which she did not agree.

15. It was evident that Josephine was in good terms with Shabnam and also had no issues with the accused before. Even Shabnam who is the mother of the accused said in her evidence that they were in good terms. I do not see any reason for Josephine to make a false complaint against the accused when she was being sheltered by his mother.
16. In the circumstances I find that the evidence of the accused and the other two defence witnesses Shabnam and Kusbhu were far from the truth when they said that the accused left his house to Kusbhu's house and that he was at Kusbhu's house at the time of the alleged incident took place. Kusbhu's husband Vinay said that the accused never came to their house and that Shabnam wanted them to make a false statement on that to the police, which he refused.
17. The assessors correctly found the accused guilty of the offence of Indecent Assault in Count No. 1. However, for the aforementioned reasons I find that the unanimous opinion of the assessors that the accused is not guilty of Rape in Count No. 2 is inconsistent and perverse.
18. I find that the complainant was truthful when she said that the accused poked his fingers into her vagina and that she did not agree with that and that she pushed him away. It is understood why she could not leave the house of Shabnam that night as a 16 year old girl when her mother was away with a DVRO in force against her. However she complained it to her grandmother and her mother the next day and that was confirmed by her mother in her evidence. The delay in complaining to the police is justified as there had been a DVRO against

Seshli, so that she could not immediately attend to the daughter. Although the defence suggested that Josephine was familiar with making complaints to the police, it was evident that it was Shabnam who assisted Josephine to make the complaint against her mother before. As a 16 year old girl Josephine waited for her mother to come to make the complaint to the police.

19. Therefore I find that the prosecution has proved all the elements of the offences of Indecent Assault in Count No. 1 and Rape in Count No. 2. I agree with the unanimous opinion of the assessors that the accused is guilty of Indecent Assault in Count No. 1
20. The unanimous opinion of the assessors that the accused is not guilty of Rape in Count No. 2 is not accepted by court and I find that the accused is guilty of Count. No. 2 as well. Accordingly I convict the accused on both Counts No 1 and 2.



  
Priyantha Fernando  
Judge

**At Suva**

26<sup>th</sup> February 2016

**Solicitors**

Office of the Director of Public Prosecutions for the State

Office of the Legal Aid Commission for the Accused.