

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 351 OF 2015

STATE

vs

JOSAIA DAU

Counsel : **Ms M. Chowdhury and Mr S. Shah** for the **State**
: **Ms V. Filipe and Ms. L. Manulevu** for the **Accused**

Dates of Trial : **23rd and 24th January 2017**

Summing Up : **26th January 2017**

Judgment : **27th January 2017**

JUDGMENT

- [1] The accused, **JOSAIA DAU** is charged for committing Rape and Sexual Assault, contrary to Sections 207(1),(2)(b),(3) and 210(1)(a) of the Crimes Decree No. 44 of 2009.
- [2] He pleaded not guilty to these two charges and the ensuing trial lasted for 2 days. The complainant, a medical officer and the Police Officer, who recorded the caution interview of the accused, have given evidence for the prosecution while the accused opted to exercise his right to remain silent.


- [3] At the conclusion of the evidence and after the directions given in the summing up, the three assessors unanimously found the accused not guilty to the counts of Rape and Sexual Assault.
- [4] I direct myself in accordance with the law and the evidence which I discussed in my summing up to the assessors.
- [5] Prosecution case was based primarily on the evidence of the complainant and the caution interview of the accused which contained some partial admissions. According to her, on the morning of the day of the incident, she was sleeping in a one room house, while the accused also laid down in another corner. During her sleep, she felt a touch, and when she woke up she saw the accused in between her widely spread apart legs. He inserted his fingers into her vagina and when she objected, the accused pressed her head down on the floor with a pillow, pulled out her breast and sucked it. It is her claim that the accused was doing each act for about 10 minutes.
- [6] During her cross examination, the complainant admitted that the accused did not insert his fingers into her vagina. There was no explanation offered to the contradictory evidence as to the element of penetration, in her re-examination. There were other inconsistencies highlighted by the accused. She also demonstrated how her breast was pulled out by the accused, over her shoulder and sucked it, whilst holding her head down with a pillow. At that time she was on the floor on her stomach with her face down.
- [7] The accused in his caution interview admitted that he sucked the complainant's breast with her consent when she has refused to have sexual relations with him, in spite of his "*nagging*". He totally denied any penetration of her vagina by fingers.
- [8] The medical evidence revealed that the complainant had fresh superficial lacerations on her *labia minora* and vaginal wall. The medical officer opined that it may have been caused due to insertion of fingers and agreed with the accused that it could also be due to scratching or due to "*rough sex*".
- [9] The assessors have found the evidence of prosecution as unreliable, as they unanimously found the accused not guilty to the counts of Rape and Sexual Assault. Their opinion of not guilty on the charge of Rape is probably due to the admission made by the complainant that there was no insertion of fingers into her vagina by the accused. In relation to the not guilty opinion on the Sexual Assault charge, in spite of the admission by the accused that he sucked her breast; the assessors would have found it an improbable version to accept after the demonstration by the complainant. The way the complainant has demonstrated how the accused did it, is

almost an impossibility. They would have accepted the accused's claim that he did so with her consent.

[10] In my view, the assessor's opinion was not perverse. It was open for them to reach such conclusion on the available evidence. The admission by the complainant that there was no penetration and the demonstration by her as to how he pulled out her breast and sucked it and its near improbability, are clear indications that the prosecution has failed to discharge its evidentiary burden to the required level. I concur with the opinion of the assessors.

[11] In the circumstances, I acquit the accused, **JOSAIA DAU** from the two counts of Rape and Sexual Assault.

[12] This is the Judgment of the Court.



ACHALA WENGAPPULI
JUDGE



At Suva

This 27th Day of January 2017

Solicitor for the State : ***Office of the Director of Public Prosecution, Suva***
Solicitor for the Accused : ***Legal Aid Commission***