

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[CRIMINAL JURISDICTION]**

High Court Criminal Case No. HAC 178 of 2016

BETWEEN : STATE

AND : 1. AVINESH PRASAD  
2. NISCHAL CHAND

Counsel : Mr Niudamu for the State  
Ms S. Khan for the first Accused  
Mr M. Anthony for the second Accused

Dates of Hearing : 15 and 16 July 2019

Closing Speeches : 17 July 2019

Date of Summing up: 19 July 2019

Date of Judgment : 26 August 2019

**JUDGMENT**

1. The Accused persons are charged with the following counts;

**First Count**

*Statement of Offence*

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to Section 209 of the Crimes Act 2009.

*Particulars of Offence*

Avinesh Prasad on the 7<sup>th</sup> day of September 2016, at Lautoka, in the Western Division assaulted Mary Elizabeth Fong with intent to commit rape.

**Second Count**

*Statement of Offence*

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to Section 209 of the Crimes Act 2009.

*Particulars of Offence*

Avinesh Prasad on the 7<sup>th</sup> day of September 2016, at Lautoka, in the Western Division assaulted Sera Tuivaga with intent to commit rape.

**Third Count**

*Statement of Offence*

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

*Particulars of Offence*

Avinesh Prasad on the 7<sup>th</sup> day of September 2016, at Lautoka, in the Western Division inserted his penis into the vagina of Mary Elizabeth Fong without her consent.

**Fourth Count**

*Statement of Offence*

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

*Particulars of Offence*

Nischal Chand on the 7<sup>th</sup> day of September 2016, at Lautoka, in the Western Division inserted his penis into the vagina of Mary Elizabeth Fong without her consent.

2. The Accused persons pleaded not guilty to the respective counts and the prosecution called six witnesses to prove the charges against them. When the prosecution case was closed the Accused persons decided to remain silent.
3. The assessors returned with their opinions after my summing up. The Assessors unanimously found the first Accused guilty to the first count and not guilty to the second count. In respect of the third count, the first Accused was found guilty by majority opinion. Also, by majority opinion of the assessors the second Accused was found not guilty to the fourth count.
4. Having directed myself with the summing up I will now review the evidence in this case to pronounce my judgment.
5. According to the evidence given by Mary Elizabeth Fong, she was drinking with her cousin, Sera Tuivaga and the two Accused persons in Lomolomo beach. When they were drinking at the beach Mary had made a call to her mother using the phone of the first Accused. After making the call she had gone to relieve herself behind a tree. Mary said then the first Accused came to the place where she was squatting. The first Accused had then pulled her hair and hit her head with a stick. Mary had then blacked out. When she woke up, the first Accused had been having sexual intercourse with her while the second Accused had been holding her hands. She said that she could feel the penis of the first Accused inside her vagina. According to Mary the first Accused had said something to the second Accused in Hindi, and he had left her with the second Accused. She said that she was only wearing a pink top, and her pants and the undergarment were not on. Mary said when the second Accused had tried to hassle her, she ran away from him looking for Sera. She also said that she could not find Sera. She had then hidden in water.
6. Mary further testified that although she hid in water the second Accused came and pulled her from her hair out of the water. She said that he threatened to hit

her with a stick, and she laid there as she was weak. Then the second Accused had inserted his penis into her vagina. According to Mary then they had seen the torch lights of the Police and the second Accused had run away. She said she too ran back to water to hide. Then a Police officer had come and pulled Mary out.

7. However, the evidence given by her cousin, Sera was not reconcilable with Mary's evidence in many respects. Their evidence was contradictory on many salient points. According to Sera, Mary had requested Sera to leave Mary and the first Accused in the beach and to go and look for a taxi with the second Accused. Sera gave evidence that when she came to the beach, she saw the first Accused trying to take off Mary's pants. The second Accused had then complained to the first Accused that Sera refused to have sexual intercourse with him. According to Sera then the first Accused had come and punched her on her chest and on her back. At that time Mary had started running for help and the first Accused had also run after her according to Sera's evidence. Sera further said that the second Accused then came and tried to pull down her pants and she had then struck his head with a stick. Then the second Accused had also run after Mary and the first Accused. Sera said then she ran to the main road looking for help.
8. The first count is assault with intent to commit rape. It is alleged that the first Accused assaulted Mary Elizabeth with intent to commit rape. According to Mary's evidence, Sera had been there at the beach when Mary went behind a tree to relieve herself, after making a call from the first Accused's phone. But Sera had not seen any assault on Mary according to Sera's evidence. According to both their evidence all four of them had been at the beach. Sera said that after Mary had a conversation with the first Accused, they requested Sera to go to the main road with the second Accused to look for a taxi. Mary said that when she regained consciousness the second Accused was holding her hands. However, according to Sera the second Accused had not been where Mary was, as he had gone with Sera to look for a taxi.

9. According to medical evidence, the forehead of Mary had been swollen and it had been tender to palpate. Dr Teri Fesaitu said that the cause of the head injury could be caused by blunt trauma and in this case due to physical assault. During cross examination Dr Fesaitu said that the injuries can be explained by other possible causes such as fights as well. However, he said that in the history given by the patient he was not told about any fights at a night club.
10. The evidence adduced in this case suggests that Mary had fought twice at a night club. During the cross-examination Mary admitted that she fought with another female at the night club. Initially she said that only she was involved in the fight and she was not physically harmed. She clearly said that her cousin Sera was not involved in the fight. She admitted during cross examination that she exchanged punches with the other female and since the fight was rough the bouncers had to throw both of them out of the club.
11. But according to the evidence of Sera, it was she who punched a female at the night club. She said then they were dragged outside by the bouncers. She further said that a fight broke out again and Mary fought with that female outside the night club. However, in contrary to Mary's evidence, Sera said that Mary was not punched. But later she again admitted that Mary and the other female threw punches at each other outside the night club. She also admitted that during the second fight she tried to stop them, and the bouncers held their arms back to stop the fight.
12. The defence argued that the injuries to Mary's forehead could be the result of the two fights that she was involved at the night club in that night. Although Sera did not corroborate Mary's evidence regarding the alleged assault by the first Accused, both Mary and Sera confirmed that Mary was involved in two fights at the night club and punches were exchanged. Further the prosecution could not rule out the possibility that the injuries could have been the results of the fights that broke out in the same night.

13. According to the second count it is alleged that the first Accused assaulted Sera Tuivaga with intent to commit rape. Sera gave evidence that when the second Accused complained to the first Accused that Sera refused to have sexual intercourse with him, the first Accused had come and punched her on her chest and her back. At that time Mary had started running for help and the first Accused had also run after her. However, Mary did not corroborate that she was present when Sera was assaulted by the first Accused.
14. The medical evidence corroborates that Sera had received blunt force trauma on her left posterior thoracic region.
15. Yet the prosecution did not adduce evidence to prove that the first Accused had intention to commit rape on Sera. According to the prosecution evidence the first Accused had assaulted Sera only when the second Accused complained and when Sera had fallen on the ground the first Accused had started running after Mary, leaving Sera. The evidence does not support any inference to be drawn that the first Accused allegedly assaulted Sera with intent to commit rape.
16. As per the third count it is alleged that the first Accused inserted his penis into the vagina of Mary Elizabeth without her consent. According to Mary the first Accused was having sexual intercourse when she was blacked out. She said that when she regained consciousness, she felt the penis of the first Accused inside her vagina and at that time the second Accused was holding her arms. Under cross examination Mary denied that she consented to have sexual intercourse as she was knocked out.
17. However, her evidence was not reconcilable with the evidence of Sera. According to Sera, she had left with the second Accused when Mary and the first Accused requested them to look for a taxi. Before that point Mary had been in a conversation with the first Accused and Sera did not corroborate the

subsequent events alleged by Mary. It is doubtful whether Mary had actually blacked out as Sera specifically said that Mary and the first Accused came and told her to go and look for a taxi. According to Mary the second Accused had been holding her hands when the first Accused was allegedly having sexual intercourse with her. In contrary to that Sera said that when she came running after the second Accused Mary was pulling her pants up. Therefore, the evidence of Mary is called into question in view of the contradictions in the prosecution evidence. Further the medical evidence did not reinforce the prosecution case in respect of the third count as it was doubtful whether the injuries received by Mary, were the results of a fight earlier that night.

18. Although sexual offences do not require evidence of corroboration, I am of the view that the evidence of Mary is not reliable and probable to conclude that the first Accused inserted his penis into Mary Elizabeth's vagina without her consent.
19. As per the fourth count it is alleged that the second Accused inserted his penis into the vagina of Mary Elizabeth without her consent. During examination in chief, Mary said that the second Accused pulled her from her hair out of the water and inserted his penis into her vagina. However, during cross examination, she was confronted with her statement to the Police where she had stated that the second Accused inserted his penis soon after the first Accused went away from her. In response to that she admitted that what she stated to the Police is false and the second Accused did not forcefully have sexual intercourse with her before running to the water.
20. Further Mary admitted under cross examination that according to her statement she has stated that when the second Accused was about to insert his penis, the Police officers came and then the second Accused ran away. Mary further admitted under cross examination that the second Accused did not forcefully have sexual intercourse with her.

21. All in all, the evidence of Mary Elizabeth and Sera Tuivaga was full of inconsistencies and contradictions. I am not inclined to believe them as credible witnesses, and I do not find their evidence to be reliable and probable. It is my considered opinion that the prosecution failed to prove the first, second, third and the fourth counts beyond reasonable doubt.

22. In the circumstances I cannot conform to the unanimous opinion of the assessors in respect of the first count and the majority opinion of the assessors regarding the third count. I concur with the unanimous opinion of the assessors in respect of the second count and the majority opinion of the assessors in respect of the fourth count.

23. Given the above, I find the first Accused not guilty to the first, second and the third counts and acquit him accordingly for the respective counts. I find the second Accused not guilty to the fourth count and he is also acquitted.



A handwritten signature in blue ink, consisting of several overlapping loops and lines.

**Rangajeeva Wimalasena**  
**Acting Judge**

**Solicitors**

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the first Accused: Messrs Iqbal Khan & Associates

Solicitors for the second Accused: Messrs AC Law