

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 022 of 2019

STATE

V

NIRBHAI CHAND

Counsel: Mr Tuenuku for the State
Mr Dayal for the Accused

Date of Hearing: 04 and 05 January, 2021

Date of Summing Up: 06 January, 2021

Date of Judgment: 07 January, 2021

JUDGMENT

1. The accused is charged with two counts of Indecently Annoying Any Person, contrary to section 213 (1) (a) of the Crimes Act, one count of Indecent Assault, contrary to Section 212 (1) of the Crimes Act, one count of Sexual Assault, contrary to Section 210 (1) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are that;

Count One

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: *Contrary to section 213 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

NIRBHAI CHAND, between 01st day of July 2014 and the 31st day of July, 2014 at Yasiyasi, Tavua in the Western Division, with intent to insult the modesty of ASHA ANSHU LATA, uttered the words “***hamar saathe karo tub hum hamar baby rok dega***”, meaning in English, “***sleep with me and have sex so that you can conceive a baby***”, intending that such words be heard by the said ASHNA ANSHU LATA.

Count Two

Statement of Offence

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

Particulars of Offence

NIRBHAI CHAND, between 01st day of July 2014 and the 31st day of July, 2014 at Yasiyasi, Tavua in the Western Division, unlawfully and indecently assaulted ASHNA ANSHU LATA by touching her breast.

Count Three

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: Contrary to section 213 (1) (a) of the Crimes Act 2009.

Particulars of Offence

NIRBHAI CHAND, between 01st day of July 2014 and the 31st day of July, 2014 at Yasiyasi, Tavua in the Western Division, with intent to insult the modesty of ASHA ANSHU LATA, uttered the words “***pana kolo mangata tumme dakhe bina kapda ke***”, meaning in English, “***open the door I want to see how you look without clothes***”, intending that such words be heard by the said ASHNA ANSHU LATA.

Count Four

Statement of Offence

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

Particulars of Offence

NIRBHAI CHAND, between 01st day of May 2015 and the 31st day of September, 2015 at Yasiyasi, Tavua in the Western Division, unlawfully and indecently assaulted ASHNA ANSHU LATA by fondling her breast.

Count Five

Statement of Offence

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

Particulars of Offence

NIRBHAI CHAND, between 01st day of May 2015 and the 31st day of September, 2015 at Yasiyasi, Tavua in the Western Division, had carnal knowledge ASHNA ANSHU LATA without her consent.

2. The hearing commenced on the 4th of January 2021 and concluded on the 5th of January 2021. The prosecution presented the complainant's evidence, while the accused and his one of the sons gave evidence for the defence. The learned counsel for the prosecution and the defence then made their respective closing addresses. I then delivered my summing up.
3. In their opinions, the three assessors unanimously found the accused not guilty of all the five counts as charged in the information.
4. Having carefully considered the evidence presented during the hearing, the respective closing addresses of the parties, the summing up, and the assessors' opinions, I now proceed to pronounce the judgment as follows.
5. In his evidence, the accused merely denied the allegation and claimed the complainant made these false allegations as she wanted to move away from the family home with her husband. Because of that intention, she had started to fight in 2018. However, the son of the accused, who gave evidence for the defence, did not mention about such a tumult made by the complainant. He stated that the complainant called him on his phone to

inform that the accused had been doing bad things to her and she will report it to the police.

6. I now turn on to determine whether the evidence given by the complainant is reliable and credible. There is a contradiction in the evidence of the complainant regarding the time of the offence of Rape. took place. During her evidence-in-chief, she said the incident of forced sexual intercourse took place four months after her first child's birth. She gave birth to her first child on the 13th of August 2015. However, during the cross-examination, the complainant answered "yes" when the learned counsel for the defence asked her whether she was still pregnant when this alleged incident of forced sexual intercourse took place. During the re-examination, the complainant then clarified her position, stating that the alleged incident of Rape took place two months after she gave birth to her first child.
7. I am staffed with the clarification given by the complainant about the time of the alleged rape incident. She specifically stated that there was a funeral taking place on the day this alleged incident of Rape took place. She said that she was just 19 years old and was not specified with the time. Having considered her evidence and the manner she gave evidence, I do not find this inconsistent nature about the time of the alleged incident of Rape took place has affected the reliability and credibility of her evidence.
8. The learned counsel for the defence emphasised that the complainant had not provided some details in her statement to the police. The complainant explained that the police officer who recorded the statement did not ask her to give those details. I accept her explanation for not providing those details in her statement.
9. Regarding the first count of Indecently Annoying Any Person, she specifically stated that the accused uttered those words in a low voice. Hence, what he said was not heard by her mother-in-law and sister-in-law, who were seated at the other end of the porch. She explained the reason why she decided not to inform anyone about this incident. She had thought that accused would stop doing such things and had never thought this would go this far.

10. The complainant had informed her husband about the two incidents pertaining to the second and third count, but he had not taken any steps. She explained how the accused had approached her when other members of the family were not around.
11. She explained the reason for the delay in reporting the matter to the police. She had informed her husband about all these incidents, but he had not taken any steps. She had finally decided to go to the police in 2018 after she gave birth to her daughter.
12. I observed that the complainant was straight, consistency and coherent in giving her evidence regarding all of these five incidents. Having carefully considered the complainant's evidence, I accept her evidence as reliable, credible and truthful evidence. I accordingly, find the prosecution has proven that the accused had committed these five offences as alleged beyond a reasonable doubt. In view of these reasons, I have cogent reasons to disagree with the unanimous opinion of not guilty given by the three assessors.
13. In conclusion, I find the accused guilty of two counts of Indecently Annoying Any Person, contrary to section 213 (1) (a) of the Crimes Act, one count of Indecent Assault, contrary to Section 212 (1) of the Crimes Act, one count of Sexual Assault, contrary to Section 210 (1) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and convict to the same accordingly.



R. D. R. T. Rajasinghe

JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State.

Messrs Dayals Lawyers for the Accused.