

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 66 of 2019**

**STATE**

**V**

**PRANIL PRAKASH SEN**

**Counsel** : Mr. Simione Seruvatu with Mr. Joeli Nasa for the State  
Mr. Jiten Reddy for the Accused

**Dates of Trial** : 4-8 and 11-12 April 2022

**Closing Submissions** : 13 April 2022

**Judgment** : 16 June 2022

## **JUDGMENT**

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused, Pranil Prakash Sen, is charged with the following offence:

### **FIRST COUNT**

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

**PRANIL PRAKASH SEN**, on the 17<sup>th</sup> day of March 2019, at Nadi, in the Western Division, penetrated the vagina of **MERESIMANI EMI TAVUYARA** with his penis, without her consent.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 7 days. Thereafter, the Learned Counsel for the Defence and State made their closing submissions.

### The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) *The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*

(2) *The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

(3) *In this Decree (Act)—*

*"legal burden", in relation to a matter, means the burden of proving the existence of the matter.*

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

### Legal Provisions and the Elements of the Offences

- [5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

- [6] Section 207(1) of the Crimes Act reads as follows:

*207. — (1) Any person who rapes another person commits an indictable offence.*

- [7] Section 207(2) of the Crimes Act is reproduced below:

*(2) A person rapes another person if —*

*(a) the person has carnal knowledge with or of the other person without the other person's consent; or*

*(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*

*(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

- [8]** Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic or legal euphemism (synonym) for sexual intercourse. In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile-vaginal sexual intercourse with that other person or having sexual intercourse whereby the man penetrates his penis into the vagina of the woman.
- [9]** In terms of Section 206 (5) the term carnal knowledge is said to include sodomy or anal sexual intercourse as well.
- [10]** Therefore, in order to prove the count of Rape, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
  - (ii) On the specified day (in this case the 17 March 2019);
  - (iii) At Nadi, in the Western Division;
  - (iv) Had carnal knowledge with the complainant Meresimani Emi Tavuyara [That he penetrated the vagina of the complainant Meresimani Emi Tavuyara, with his penis];
  - (v) Without the consent of the complainant; and
  - (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [11]** To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [12]** The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [13]** The fourth element involves the penetration of the complainant's vagina, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any

extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

[14] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.

[15] It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[16] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or that he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[17] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 21 years of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.

### **The Admitted Facts**

[18] Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), deals with “Admission of facts”. The Section is reproduced below:

*135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.*

*(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—*

*(a) by the prosecutor; and*

*(b) by the judge or magistrate.*

*(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.*

[19] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

1. The accused in this matter is Pranil Prakash Sen, 35 years old, immigration officer of CAAF quarters, Nadi at the time of the alleged offence.
2. The complainant in the matter is Meresimani Emi Tavuyara, 21 years, waitress of Martintar, Nadi at the time of the offence.
3. On the 17<sup>th</sup> of March 2019, at around 1.00 p.m., the complainant went to the Immigration safe house at Beverly Hill, Votualevu, Nadi to deliver food to persons by the name of Mustafa and Mohammed.

[20] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

## **Case for the Prosecution**

[21] The prosecution, in support of their case, called the complainant, Meresimani Emi Tavuyara, who was the sole witness for them.

### **[22] Evidence of the complainant Meresimani Emi Tavuyara**

- (i) *The complainant testified that she currently resides at Navosa Highlands and is doing domestic duties (she is unemployed). She is now 24 years of age.*
- (ii) *She said that in the year 2019, she was working as a waitress at Istanbul Kebab in Namaka. She had worked there for 5 months. She was 21 years of age at the time.*
- (iii) *The witness said that her boss had 2 sons who directly came from Turkey. Their names were Mustafa (same age as her at the time) and Mohammed (27 years at the time). She said: "After two weeks of staying with us the Immigration Office came and took them to the Immigration safe house."*
- (iv) *On 17 March 2019, her boss had given her some food to take down to his two sons. She went down to the Airport Border Police to ask them for the location of the Immigration safe house. They had given her the exact location-they had written it down on a piece of paper. She had taken a yellow cab to the location-an airport taxi.*
- (v) *She had gone straight to the Immigration safe house located at Votualevu. This was around 1.00 p.m. It was soon after lunch-during her break time.*
- (vi) *It is an admitted fact that on the 17 March 2019, at around 1.00 p.m., the complainant went to the Immigration safe house at Beverly Hill, Votualevu, Nadi to deliver food to persons by the name of Mustafa and Mohammed.*
- (vii) *The witness testified that at the safe house, there was an Indian man (the Security Officer). She had asked him whether that was the Immigration safe house. He had said yes and let her in. She said she had never been to the safe house before-it was her first time there.*
- (viii) *After letting her in, he had called for Mustafa and Mohammed, while she was waiting at the shed. While waiting, she took out the food and placed it on the table and waited for them to come down.*
- (ix) *The witness said: "When they came down, while they were still standing with me, the Security told me that an Immigration Officer called Pranil had called and told me to wait for him".*
- (x) *After one hour of waiting, the Immigration Officer Pranil had showed up in a grey taxi. As soon as he had got out of the taxi, he started talking to her in a rude manner. She was trying to explain to him that she got the address of the safe house through the Border Police. "He was talking in a harsh manner. He was rude to me. He said, I was violating some rules and I was trespassing".*

- (xi) *Pranil had not explained to her the rules she had violated. However, he had told her, that if he was going to take her out to the Immigration Office for them to deal with her, they would charge her for 3 to 5 cases.*
- (xii) *The witness said, that on hearing this, she started to get scared. "The first thing that came to my mind is, if I am charged, who is going to look after my daughter. She's turning 7 this August". So back in 2019 her daughter would have been 4 years of age.*
- (xiii) *Pranil had asked her to get into the taxi and that he was taking her to the Immigration Office. The witness had got into the taxi. It was the same grey taxi that he had come in. However, from the safe house, they had gone to the Kontiki Motel. On the way to the motel, she said: "He was threatening me that I will get 5 to 7 years if he takes me to the Immigration Office and they find out I was trespassing".*
- (xiv) *After arriving at the motel, Pranil had got off and gone into the motel. He had not said anything to her. He was just talking to the driver. She cannot recall what he said to the driver as he was talking in Hindi.*
- (xv) *As soon as Pranil got off, she had asked the driver to drop her off at her workplace. The taxi driver then took her out from the motel. When they were about to reach the roundabout at Votualevu, the driver had got a call from Pranil. She had known it was Pranil who was calling because the phone was actually on speaker mode.*
- (xvi) *The driver had explained to her what Pranil had told him over the phone. "He said that Pranil was so mad and why did he take me out of the motel. And he told the driver to tell me that he wants to clear things out with me before I go back to work".*
- (xvii) *Thereafter, the driver had taken her back to the motel. After coming to the motel, the Receptionist had directed her to where Pranil was. She had gone there and knocked the door. The witness said: "He came outside. He told me that he just wants to clear some things out before he lets me go back.... He came out of the room and he took me inside".*
- (xviii) *When asked what happened inside the room, the complainant said: "Before he took me inside, his tone was very friendly and he said he wants to talk things out. As soon as we were inside the room, he locked the door and he started telling me to take off my clothes".*
- (xix) *The witness said: "I told him that I have a daughter and I was expecting for us to talk things out not that way but in a more decent way". She continued: "He just took my hand and he took me inside the bathroom. He made me sit on the pan of the toilet while he was having his shower. After his shower, he grabbed my hand and threw me on top of the bed". She said the distance between the shower and the bed was about 3 metres.*
- (xx) *The complainant testified further that Pranil had been wearing brown trousers and a black belt. He had taken out his trousers before he went for the shower and placed it on the bed. After he finished the shower and he threw*

*her on the bed, he had taken the belt out of the trousers and started threatening her, when he was on top of her, with the belt on her neck.*

*(xxi) He had been telling her that if she ever went to the Police, it won't be a smart move, because he has got connections all over Nadi.*

*(xxii) The following questions were then asked from the witness and she answered as follows:*

*Q. How did you feel after he had threatened you?*

*A. I was very scared.*

*Q. Why were you scared?*

*A. Because he put the belt onto my neck and he started saying these things – what he told me earlier.*

*Q. What happen after these threats were made to you?*

*A. He forced himself inside me for about 3 to 5 minutes.*

*Q. What do you mean?*

*A. Forcing his penis inside my vagina.*

*Q. Before he had done this, what were you wearing?*

*A. Just a long skirt and a t-shirt..... Everything happened when he was threatening me. That's when he was pulling my panty off. That's when he forced himself inside me.*

*Q. When he was doing this to you, what did you do? When he was removing your panty and skirt?*

*A. I was telling him to stop. I asked him to think twice. I was pushing him, he was too heavy.*

*Q. How did you know that he had put his penis into your vagina?*

*A. Because I felt it. He was on top of me for 5 minutes to 7 minutes or something.*

*Q. What did you?*

*A. I was trying to push him off and I was scared at the same time.*

*Q. When he did this to you, did you agree for him to do this?*

*A. No.*

*Q. What happened after?*

*A. He passed me my panty and told me to get dressed. And last thing he told me was, don't ever think of going to the Police or anyone else because*



*these charges will come against you..... Those trespass chargers and other chargers he said he is going to place against me.*

*Q. How did you feel?*

*A. I was ashamed of myself for not being able to push him out. I started hating myself for not being able to do anything.*

*Q. Why did you feel ashamed?*

*A. Because I have a daughter. I was scared because he was threatening me, saying he has a lot of connections in Nadi, if I go to the authorities.*

*(xxiii) The complainant testified that after the incident, she took a taxi back to her workplace. She went and spoke to her boss and Ben Padarath. She had told them everything that happened at the safe house and everything that Pranil had done to her. They had taken her to the Police Station for her to report the matter.*

*(xxiv) The witness said, that from the time Pranil arrived at the safe house, up until the time the two of them had left in the taxi, it would have been 20 to 35 minutes. The taxi ride from the safe house to the Kontiki Motel was not more than 5 minutes. The incident in the motel-from the time she had gone back to the motel, met with Pranil, the incident which happened in the room and she left the motel-would have taken about half an hour.*

*(xxv) The complainant identified the accused in the dock as Pranil Prakash Sen.*

*(xxvi) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.*

*(xxvii) The complainant confirmed that she had been working as a Waitress at Istanbul Restaurant for about 5 months-from January to May 2019. The owner of the restaurant is Shazi Ukar, a Turkish national.*

*(xxviii) The complainant said that the date of the alleged incident (17 March 2019) was a Sunday. She was questioned at length about her whereabouts and her movements from the 13 March 2019 to 15 March 2019. She said she had been on leave from work on the 14 March 2019 (which was a Thursday).*

*(xxix) It was suggested to her that she was admitted at the Nadi Hospital from 13 March 2019 to 15 March 2019. However, the witness denied that she had been admitted. She said she only went for change of dressing (COD). She said back in 2019, she had boils on her back and went for dressing.*

*(xxx) When asked if she was pregnant at that time between 13 March 2019 to 15 March 2019, she denied being pregnant. However, she said: "No, I was not pregnant. I had an ectopic pregnancy but it came out negative".*

*(xxxi) It was again suggested to the witness that she was admitted at the Nadi Hospital from 13 March 2019 to 15 March 2019 for an ectopic pregnancy. She answered as follows: "They said I have to be admitted. But I signed out against the doctor's orders after my scan came out negative at the Lautoka Hospital".*

- (xxxii) *The complainant also testified that she was having irregular menses and that she had informed the doctor about her medical condition. She said she did not have her menses on the 13 March 2019. "I did not have menses until they pushed some metal thing inside my private part. That's when the bleeding started".*
- (xxxiii) *When asked if she was still bleeding on 17 March 2019, she said no. It was then suggested to the witness that she was bleeding on the 17 March 2019. However, she disagreed.*
- (xxxiv) *The witness agreed that she had been examined by a doctor on 19 March 2019, at the Namaka Health Centre. This was 2 days after the alleged incident of rape. It was suggested to her that during the examination, there was a foul smell coming out of her vagina. It was further suggested that the reason for this foul smell from her vagina was due to the ongoing bleeding from 13 March 2019 up to the date of examination. The witness denied these suggestions.*
- (xxxv) *When asked as to who took off her clothes, the witness said that she did. She had been wearing a long skirt and a black t-shirt, and a bra and panty inside. She said the colour of her panty was black.*
- (xxxvi) *It was suggested to her that when Pranil was having his shower, she still had her panty on and was sitting on the toilet pan. The witness said she cannot recall.*
- (xxxvii) *It was also suggested to her, that after Pranil had his shower, he went into the room first and she had followed him. She said, she cannot recall this. However, she only recalls the part where he threw her onto the bed.*
- (xxxviii) *It was further suggested to the complainant that after she followed Pranil into the bedroom she herself had taken her panty off. Again she said she cannot recall.*
- (xxxix) *It was further suggested to the witness that she was the one who took off her own panty and lay on the bed for Pranil to have sex with her. Again the witness said she cannot recall.*
- (xl) *During the cross-examination of this witness, she was referred to the statement made by her to the Namaka Police on 18 March 2019. The defence highlighted certain omissions in that statement, in comparison to the testimony given by her in Court:*
- i. That there is no mention in her statement that Pranil had told her, "Who the hell told you to come here?"*
  - ii. That there is no mention in her statement that when the taxi driver had brought her back to the motel the second time, she had not got off the taxi straightaway, because the taxi driver kept briefing her that Pranil just wanted to clear things off just before she goes back to work.*
  - iii. That there is no mention in her statement that Pranil had pushed her onto the bed.*

- iv. *That there is no mention in the statement that when Pranil was forcing himself on her, that she had told him to think twice and told him to stop.*
  - v. *That there is no mention in her statement that she was pushing the accused and that he was heavy.*
  - vi. *That there is no mention in the statement that when Pranil inserted his penis into her vagina, that she did not agree for him to do so.*
  - vii. *That there is no mention in the statement that when Pranil pushed her on the bed, that he pulled his belt and placed it on her neck.*
- (xli) *The defence also highlighted the following two inconsistencies in the testimony given in Court by the witness vis a vis her statement made to the police:*
- i. *In her testimony in Court she said the Receptionist at the motel directed her to the room where Pranil was by pointing out to the room number. However, in her statement made to the Police, it is recorded as follows: "I then called out Pranil and Pranil came out from a room without a room number".*
  - ii. *In her testimony in Court she said that it was the accused who had removed her panty. However, in her statement it is recorded as follows: "Then after shower I followed Pranil to the bed where I took off my black panty".*
- (xlii) *It was suggested to the complainant that the accused did not insert his penis into her vagina. She said that was not true.*
- (xliii) *It was suggested that on the day of the alleged incident, she was having vaginal bleeding and that she was also wearing a pad inside her panty to prevent the blood flow. The witness denied this suggestion and said that she wears a pad everyday she goes to work because of the sweat.*
- (xliv) *It was further suggested that there was a foul smell coming from her vagina that day because of her vaginal bleeding. Due to this fact, the accused had refused to insert his penis into her vagina. Instead of inserting his penis into her vagina, the accused had allowed her to suck his penis. That the complainant had sucked his penis after which the accused had ejaculated. The complainant denied these suggestions.*
- (xlv) *It was also suggested that after the incident, both the complainant and the accused came out of the room together, and that both of them were in a very happy mood, enjoying a cordial relationship when walking out of the motel. The witness said that she had to do so because she was being threatened. She also said that she came out of the room first and that the accused came after.*
- (xlvi) *It was further suggested to the witness that she was set up by her boss and Ben Padarath to frame the accused because of the arrest and detention of her boss's two sons by the accused. The witness denied the suggestion.*
- (xlvii) *In re-examination, the State Counsel clarified from the witness certain answers given by her in cross examination.*

*(xlviii) With regard to the omissions found in her statement to the Police, the complainant said that she clearly remembers telling the Police about these matters during her interview.*

[23] At the end of the prosecution case Court decided to call for the defence. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[24] The accused decided to testify on his own behalf. He also called witnesses Dr. Sainimili Bulatale, Beni Tinai, the Receptionist at the Kontiki Motel and Vinod Kumar, a taxi driver, to testify on his behalf.

### **Case for the Defence**

#### **[25] Evidence of Pranil Prakash Sen**

- (i) The witness testified that he is 39 years old. He currently resides at Nausori.*
- (ii) The witness said that he is visually impaired. This is due to retinitis pigmentosa. Due to this condition his retina has been affected. The doctors have told him that over a period of time he won't be able to see anything. There is said to be no cure for this eye disease. Presently he can see only shadows. Even to see this there has to be bright light. If there is very bright light, he can see a little bit.*
- (iii) The witness said that he is a Bachelor of Commerce graduate, majoring in Accounting. He graduated in the year 2015 from the Fiji National University.*
- (iv) The accused said that the allegation of rape made against him by the complainant is false.*
- (v) He was working as an Immigration Officer from November 2018 till 17 March 2019. His services had been terminated after this incident.*
- (vi) The witness said that on 17 March 2019, he was at his Immigration Office at Namaka, Nadi. He was doing his pending work. He was preparing his detainee's report in respect of the two Turkish nationals, Mohammed and Mustafa. He had received a call from the Immigration safe house. Security Officer named Kishore Kumar had called him.*
- (vii) He had gone to the Namaka taxi base, got into a taxi and gone to Istanbul Kebab Restaurant. This is the place from where he had apprehended the two Turkish nationals. He had gone to the restaurant and asked the owner of the restaurant to provide meals for the two Turkish nationals. He said the owner*

*had then given him food which he had taken to the detention centre/safe house. Prior to doing so, he had asked the owner if he had sent food with anybody for the two Turkish nationals. The owner had said that he had not done so.*

- (viii) The witness had then taken the food and gone to the Detention Centre in the same cab (taxi) that had been waiting for him.*
- (ix) On reaching the safe house, he had asked the Security where the iTaukei girl who brought food for the Turkish nationals was. The Security had directed him to the carport and he had gone there. The witness had asked the complainant a few questions, such as, who she was, how she knew that this is the Immigration safe house, why she had to come there and who told her to come there etc. The complainant had replied that her name was Emi and that she went to the Border Police and an iTaukei Police Officer had given her the location of the safe house. So she boarded an airport taxi and came there. She said she had brought food for Mohammed and Mustafa.*
- (x) The witness had told her that this is a very confidential place and that she is not supposed to be there without permission. He had also told her that if she wants to meet the detainees, she must contact the Immigration Office and they will facilitate the meeting.*
- (xi) The witness said that he had been angry and told her that she has breached Immigration law and have trespassed without permission by bringing food for the two detainees and that she is not supposed to do that.*
- (xii) At that stage the complainant had become emotional and started crying. The witness said: "I told her not to cry. I will let you go and ensure that this will not happen in the future. Don't come without permission. Otherwise you will be charged for trespassing".*
- (xiii) The witness then asked the complainant to leave. She had told him that she does not have any transport. He had told her, that he will arrange her transport after attending to the detainees and the Security.*
- (xiv) The witness said that he then went to the taxi driver and asked him if he is willing to drop off the complainant wherever she wants to go after dropping him at the Kontiki Motel. He was going to the Kontiki Motel since he wanted to get a massage, because a couple of times before he has gone there for a massage for relaxation.*
- (xv) The witness said that he went to the motel in the same taxi that he came to the Detention Centre. He had been sitting in the front passenger seat, while the complainant was sitting on the rear passenger seat just behind him.*
- (xvi) Upon the taxi arriving at Kontiki Motel, he got off the taxi and told the driver that he was going for a massage. Once he finishes his massage, he will call the driver to come and pick him back from the motel. He had also told the taxi driver to drop the complainant safely wherever she wants to go.*
- (xvii) The witness had paid \$30.00 to the Receptionist at the motel and asked her for a room for the massage. The Receptionist took him to the room. On*

*reaching the room, he had asked as to where the masseur was. The Receptionist had said that they don't offer massagers now.*

*(xviii) Therefore, he called the taxi driver and asked him to come and pick him up because they don't offer massagers at the motel now. He had been waiting in the room. There was a knock on the door. Initially he had thought that it was the taxi driver who came to pick him up. So he had asked who it was. Then the person at the door had said that it was Emi and that she had come to massage him.*

*(xix) The witness said that he was shocked. On opening the door he had realized that it was the same girl who had come to the safe house. She said she had overheard the conversation between him and the taxi driver. The taxi driver had told her that Pranil had called him to come and pick him from the Kontiki Motel because there was no masseur.*

*(xx) When asked whether he had agreed for her to massage him, he said yes. "I said yes, you can massage me if you have come here to massage me".*

*(xxi) At the time the complainant came to the room the Receptionist was in the room drawing up the curtains. Then she had left.*

*(xxii) Thereafter the complainant and the witness had gone into the room. She had asked him to have his shower. He had told her that he is visually impaired and to show him the bathroom. The witness said: "Then I took off my clothes and had my shower. Then when I came off the bathroom this iTaukei girl held on to my left elbow and with the help of the walls and my baby steps I came to the bed. Then I slept on the bed and then she started touching my inner thighs and then I had an erection and we kissed each other. Then she asked me shall we have sex. Initially I said yes. Then she started to take off her panty. After that I had/got a very bad smell. I can smell something bad. Then I asked her what was that smell about. She said she was pregnant and bleeding. Then I told her in that case, I don't want to have sex. Then she hold my penis and she asked if she can suck my penis. Then she sucked my penis/we did the blow job, after giving my consent. Then I was about to come and then she took off her mouth from my penis. So all the sperm fell on my trings and the bed sheet. After that I wiped the places I felt wet on my body with the bed sheet then I called the taxi driver".*

*(xxiii) The witness said that the complainant helped him by giving his clothes to him. Then they had dressed. He had called the taxi driver to come and pick him. Then they had come out of the room and gone to the reception area. He said thanks to the Receptionist. When the taxi arrived, he had got into the taxi and gone back to the Immigration Office in Namaka. The complainant had said that she wanted to go somewhere nearby. She had not joined him in the taxi.*

*(xxiv) The witness denied that he had inserted his penis into the complainant's vagina. He said he did not insert his penis into her vagina because of that bad smell. He said: "I could not stand that bad smell".*

(xxv) *The witness was cross examined at length by the State Counsel. The prosecution's version of the events were put to the witness as suggestions.*

**[26] Evidence of Dr. Sainimili Bulatale**

- (i) *The Doctor testified that she is currently based at the Border Health Unit, Nadi International Airport. She is currently the Senior Medical Officer at the Border Health Unit.*
- (ii) *She had obtained her MBBS Degree from the Fiji School of Medicine in 2013. Thus she has been a Medical Practitioner for the past 8-9 years.*
- (iii) *The witness said that she had conducted the medical examination on the complainant, Meresimani Emi Tavuyara, on 19 March 2019, at 11.32 a.m. at the Namaka Health Centre. The Medical Examination Report was tendered to Court as Defence Exhibit **DE1**.*
- (iv) *The Doctor testified as to the specific medical findings as found in column D12.*
  - a) *Under head, eyes, ears, nose and throat (HEENT) she has noted hydration good, oral mucosa (OM) pink and moist. The doctor explained that this means the complainant was not dehydrated at the time and that the mouth area is all normal.*
  - b) *Under chest and abdomen, no abnormalities have been detected or noted.*
  - c) *Under extremities (which is the examination of upper and lower limbs), the witness has noted that the right elbow/arm was swollen and there was difficulty in extending.*
  - d) *Under vaginal examination (VE)/genitalia examination, it is said to be noted at page 5 (which is Appendix 1).*
- (v) *The Doctor further explained these findings with reference to diagram drawn by her at Appendix 1.*
- (vi) *With regard to the vaginal examination, the doctor has noted that the hymen is not intact, cervical OS slightly open with purulent/discharge noted, slightly foul smelling. Bleeding is also noted. During the vaginal examination a high vaginal swab (HVS) and a low vaginal swab (LVS) have been taken.*
- (vii) *The Doctor confirmed that in her professional opinion (which is depicted at D14), she has noted that the physical/sexual injuries indicated acute injury noted. The doctor explained that by acute injury she meant an injury which has happened recently - 2 to 3 days.*
- (viii) *The doctor further testified that the vaginal examination is a very sensitive one. There is an instrument called the speculum which has been used. It is a*

*longitudinal metal object. This is inserted into the patient's vagina so that a clear view can be obtained inside of the vagina. This is referred to as a speculum examination.*

- (ix) The witness testified that under additional information (at D15) it is recorded that the complainant has been admitted at the Nadi Hospital from 13 to 15 March 2019, with ectopic pregnancy. It is stated that after the incident she started bleeding again.*
- (x) The doctor explained that a normal pregnancy is when the baby is forming in the woman's baby bag or uterus. An ectopic pregnancy is when the baby forms outside the uterus. This is abnormal and life threatening to the woman. In layman's terms it is called a tubal pregnancy.*
- (xi) The signs and symptoms of a tubal pregnancy is that the patient will usually have lower abdomen pain. They will also have vaginal bleeding. She will be shown to be pregnant in a pregnancy test. In order to detect the pregnancy you have to do an ultra-sound scan so as to find out the location of the pregnancy. During a normal pregnancy, you will not have any bleeding. The menses will stop for a full 9 months. If a woman is pregnant and bleeding it is a red flag. That's why we investigate.*
- (xii) When asked as to how she got this information that the complainant had been admitted at the Nadi Hospital from 13 to 15 March 2019, the witness said that this was relayed to her by the patient. She tried to locate her folder but was unable to do so. However, she found that the complainant presented herself to Nadi Hospital on 13 March 2019, for an ultra-sound scan.*
- (xiii) In cross-examination the witness confirmed that the physical and sexual injuries as referred to by her at D14 relate to the history given by the patient at D10. She further explained that some of the physical findings are consistent with the history given at D10 of someone who would have been raped.*
- (xiv) When asked whether in her medical opinion it is possible that the findings noted at D14 could have been caused by penile penetration, the witness said yes. When asked whether in her medical opinion it is still possible that someone who is suffering from an ectopic pregnancy can still engage in penile sexual intercourse, the witness said yes.*
- (xv) The doctor testified that at the time she could not verify herself as to whether the information that the complainant had been admitted at the Nadi Hospital from 13 to 15 March 2019 was correct. However, prior to coming for this trial, she was able to verify that the complainant had in fact come in for an ultra-sound scan on 13 March 2019. But her folder could not be located. Therefore,*



*the witness said that the information at D15 that the complainant was admitted continuously from 13 to 15 March 2019 could be incorrect.*

**[27] Evidence of Beni Tinai**

- (i) The witness said that she is currently working as a Sales Representative at a shop in Nadi Town. She is residing at Votualevu, Nadi and is 36 years of age.*
- (ii) The witness testified that in March 2019 she was working at the Kontiki Motel as a Receptionist. She was also doing Housekeeping. As at March 2019, she had been working there for 7 years.*
- (iii) She recalls the events which took place on Sunday the 17 March 2019. She was doing the morning shift which is from 7.00 a.m. to 3.00 p.m. However, that day she was doing both shifts until 11.00 p.m.*
- (iv) The witness said that the accused had come to the motel that afternoon. He came alone and asked for a room. He had paid \$30.00 for the room. She had then taken him to the room and asked him for a few minutes to tidy up the room, the bed sheet and to draw the curtains.*
- (v) The accused had then asked her whether she can provide a lady to massage him. She had said that they can't provide a lady for him. That he has to bring his own lady for the massage. She had continued tidying up the room. She had heard the accused talking to someone on the phone in the Hindi language. She didn't understand what he was talking, but just heard the accused say the word 'massage'.*
- (vi) Soon after she had seen an iTaukei lady besides the accused. She didn't know how the lady came there. The witness said: "Sir I apologize for taking your time. Then the lady smiled at me. Then I told them enjoy your time. Then I go back to my work station".*
- (vii) The witness was asked as to whether the accused or the iTaukei lady had responded. She said: "No response. Only the face they smiled. The girl was ok. Then I went to my station".*
- (viii) The witness said that when she was at the reception both the accused and the iTaukei girl came out. She continued: "Sir tell me thank you. I said thank you. Then they go out of the hotel".*
- (ix) When asked whether they came separately or together, the witness said: "They came together. The girl is ok".*
- (x) During cross examination the witness was referred to the statement made by her to the Namaka police on 22 March 2019. The prosecution highlighted the following inconsistency in the testimony given in Court by the witness vis a vis her statement made to the police:*

*In her testimony in Court she said, that when the accused and the iTaukei girl were leaving the motel she had spoken to them.*

*However, in her statement made to the Police, it is recorded as follows: "They never spoke back to me and I didn't know how they went from there".*

**[28] Evidence of Vinod Kumar**

- (i) *The witness testified that he is now 60 years of age and residing in Nadi. He said he used to drive a taxi. However, now due to cataract, he doesn't drive.*
- (ii) *The witness testified to the events that took place on 17 March 2019. On the said day he had started work around 7.00 in the morning and finished work around 5.00-5.30 p.m.*
- (iii) *The witness said that on the 17 March 2019, he had done a taxi job for the accused.*
- (iv) *Around 3.00 p.m., the accused had come to the Namaka Lane taxi base and got into his taxi. He had wanted to go to a restaurant near the Melanesian Hotel. The witness had taken the accused there. The accused had got off the vehicle and returned with a plastic bag containing food.*
- (v) *The accused had then told the witness to take him to Beverly Hills, Votualevu the safe house. On arrival there, a Security Officer had come and opened the gate. Then the Security Officer had told the accused that one girl had brought food and shown where the girl was. The accused had gone up to the girl and asked her why she had come inside (there) and that it is a private property and that she can be charged.*
- (vi) *After taking the food he had brought inside, the accused had come back and told the girl to leave. Then he had got into the taxi. The witness said: "He got into the car. He asked me can you drop me at Kontiki and can you drop this girl at Namaka. I said yes. After dropping you, I can go back to Namaka".*
- (vii) *He had then left the safe house, along with the accused and the girl. The accused had been sitting in the front passenger seat, while the girl was sitting at the back. Before leaving the safe house the witness said that he had asked the girl where she wanted to get down, and the girl had said that she wants to get down at New World Namaka.*
- (viii) *The witness testified that he had then driven to the Kontiki Motel. On arrival at the motel the accused had got off. The accused had told him that he wanted to get a massage and wanted the witness to pick him back.*
- (ix) *Thereafter, the witness had left with the girl seated at the back. He said: "After I left Kontiki- I just climbed up the hill- when I heard the girl's phone ringing. Then she said I am coming. After that I just went to the main road. I went almost up to Tanoa International Hotel. Then Pranil called me. He said can you come back to pick me up. I said yes I am coming. I parked my car and I asked him what happened. He said I came here for a massage-masseur is not here. So pick me up".*
- (x) *He witness said he had asked the girl to get off at that point- near the Tanoa International Hotel. That's the Votualevu main road. He had told her to get off there because he was going back to pick the accused.*
- (xi) *However, the witness said that the girl had not got off there. He further testified: "She asked me why you are going back to pick him. I told her masseur*

*not there. Then she said I can massage. I told her you talk to Pranil. Then she told me take me back I will talk to him. Then I told her if I take you back I have to on the taxi meter. Then she agreed”.*

- (xii) Accordingly, the witness said that he had taken the girl back to the Kontiki Motel. When he reached the motel he had tried to call the accused, but he had not answered. Then the girl had got off from the taxi. And he had waited for the accused. However, while so waiting he had got another job (hire).*
- (xiii) Around 30-35 minutes later the accused had called him again and asked to pick him up. So he had gone to the motel to pick the accused. At the time he picked the accused up, the accused was alone.*
- (xiv) The witness said he didn't see where the girl went.*
- (xv) During cross-examination the witness was referred to the statement made by him to the Namaka Police on 22 March 2019. The prosecution highlighted the following inconsistencies in the testimony given in Court by the witness vis a vis his statement made to the police:
  - i. In his testimony in Court he said that the accused had come to the Namaka taxi base and got into the taxi.  
However, in his statement made to the Police, it is recorded as follows: “On the 17<sup>th</sup> day of March 2019, at about 3.00 p.m., one Immigration Officer rang on my phone and told me to pick him from the Immigration Office”.*
  - ii. In his testimony in Court he said that the accused had told him that he was going to the Kontiki Motel to get a massage.  
However, in his statement it is recorded as follows: “Whilst on the way Pranil told me to drop him to Kontike Motel as one of his friends was waiting for him”.*
  - iii. In his testimony in Court he said that when he reached the motel he had tried to call the accused, but he had not answered. Then the girl had got off from the taxi. And he had waited for the accused. However, while waiting he had got another job (hire).  
However, in his statement it is recorded as follows: “Whilst at Kontiki Motel that i-Taukei girl got off and I rang Pranil to ask where he was. Then Pranil told me that he is waiting outside near the hill entrance facing Beverly Hills. I then picked Pranil and brought him back to Namaka Immigration office”.**
- (xvi) During cross-examination the prosecution also highlighted certain omissions in the police statement, in comparison to the testimony given by the witness in Court.*
- (xvii) As to the inconsistencies and omissions the witness explained that his statement had been recorded by an Indian Police Officer, who had been banging on the table while questioning him and had told him that he can say whatever he wants, but that the accused had told the police what he*

*had done. So the witness is not certain if the police wrote everything he had told them.*

### **Analysis**

- [29] The prosecution in support of their case, called the complainant, Meresimani Emi Tavuyara, who was their sole witness. The accused testified on his own behalf and also called witnesses Dr. Sainimili Bulatale, Beni Tinai, the Receptionist at the Kontiki Motel and Vinod Kumar, a taxi driver, to testify in support of his case.
- [30] As I have stated earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove the elements of the charge beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove at paragraph 10 of this judgment.
- [31] As I have again stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as admitted facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.
- [32] I have summarized the evidence of all the witnesses led during the trial. The complainant had testified as to how the accused had inserted his penis into her vagina.
- [33] The accused denies that he inserted his penis into the complainant's vagina. He says that he had did not insert his penis into her vagina because of the bad smell that had emanated at the time the complainant had removed her panty and due to the fact that she was bleeding at the time. The accused stated further that he had allowed the complainant to suck his penis or to have oral sex with him.
- [34] The defence called Dr. Sainimili Bulatale, the Medical Officer who had conducted the medical examination on the complainant, Meresimani Emi Tavuyara, on 19 March 2019, at the Namaka Health Centre. The Medical Examination Report was tendered to Court as Defence Exhibit DE1.
- [35] The defence was trying to establish that the complainant had been admitted at the Nadi Hospital from 13 to 15 March 2019, for an ectopic pregnancy. The doctor testified that at the time she could not verify herself as to whether this information was correct.

However, she stated that prior to coming for this trial, she was able to verify that the complainant had in fact come in for an ultra-sound scan on 13 March 2019. But her folder could not be located. Therefore, based on this material, the witness said that the information that the complainant was admitted continuously from 13 to 15 March 2019 could be incorrect.

[36] The defence was also attempting to establish that due to the ectopic pregnancy the complainant was not in a position to engage in penile sexual intercourse. However, the Medical Officer categorically stated that in her medical opinion it is still possible that someone who is suffering from an ectopic pregnancy can still engage in penile sexual intercourse.

[37] The accused also said that the complainant had voluntarily come into his motel room to give him a massage. However, this position was never put to the complainant at the time she gave evidence in Court. It is noted that the complainant was cross-examined at length by the Learned Counsel for the defence. However, this crucial fact was never suggested or put to the complainant.

[38] Therefore, I cannot accept the accused version of events as truthful and reliable. Accordingly his evidence is rejected.

[39] However, when analysing the complainant's evidence, I have considered, inter alia, the following matters. At the time the accused first came to the Kontiki Motel on 17 March 2019, he had got off at the hotel and gone inside. The complainant was not asked or directed by the accused to get off the taxi at that point in time. It is in evidence that the complainant had come back to the motel voluntarily. She had gone to the reception and found out where the accused was and then gone up to the room.

[40] Defence witness, Vinod Kumar, testified that at the time he dropped off the accused at the Kontiki Motel, the accused had told him that he wanted to get a massage and wanted the witness to come back and pick him up later. He had then driven away from the motel with the complainant.

[41] The witness said that near the Tanoa International Hotel he had told the complainant to get off because he was going back to pick the accused. However, she had not got off at that point in time. Vinod Kumar testified further that at her request he had then taken the complainant back to the Kontiki Motel, where she had got off the taxi.

[42] Even the Receptionist of the motel Beni Tinai has stated that the complainant had come to the room where the accused was on her own. At the time the witness had been tidying up and getting the room ready for the accused. The complainant had been smiling and did not look in any sort of distress.

[43] It is in evidence that inside the room, the complainant herself had taken off her skirt and her t-shirt. She had remained in the room while the accused was taking his shower. In fact, she had been sitting on the toilet seat while the accused took his shower with only her panty on. There was ample time and opportunity for the complainant to leave the room if she wished to do so.

[44] After the alleged incident the complainant had left the room together with the accused. The Receptionist of the motel Beni Tinai testifies to this fact as well. Even at that time the complainant had not shown any signs of distress.

[45] Therefore, having analysed all the evidence led in this case in its totality, it is my opinion that the prosecution has failed to prove the charge of rape beyond reasonable doubt.

[46] In the circumstances, I find the accused not guilty of the charge of Rape with which he is charged.

[47] Accordingly, I acquit the accused of the charge of Rape.



  
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 16<sup>th</sup> Day of June 2022

**Solicitors for the State:**

**Office of the Director of Public Prosecutions, Lautoka.**

**Solicitors for the Accused:**

**Messrs Jiten Reddy Lawyers, Barristers and Solicitors,  
Suva.**