

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 75/2020

STATE

vs.

DANIEL SINGH

Counsels:

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| <i>Mr. Baleilevuka K and Mr. Singh</i> | - | <i>for Prosecution</i> |
| <i>Mr. Dharmendra Kumar</i> | - | <i>for Accused</i> |

Date of Hearing: 29.08 – 02.09.22

Date of Judgement: 05.10. 2022

JUDGMENT

1. The accused in this matter, **Mr. Daniel Singh**, was charged with one count of **Rape** and one count of **Sexual Assault** against **Fiona Faira Hafiz (Prosecutrix)** without her consent, as below:

COUNT ONE

Statement of Offence

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

Particulars of Offence

DANIEL SINGH: between the 14th of January 2019 to 31st of January 2019 at Nasinu, in the Central Division, had carnal knowledge of **FIONA FAIRA HAFIZ** without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

DANIEL SINGH between the 14th of January 2019 to 31st of January 2019 at Nasinu, in the Central Division unlawfully and indecently assaulted **FIONA FAIRA HAFIZ** by squeezing her breasts and touching her clothed genitalia.

2. Upon reading of the charges in Court on 16th June 2020, Mr. **Daniel Singh** understood and pleaded not guilty to the charges filed against him. At the trial, the Prosecution led the evidence of the Prosecutrix and **Romika Lata**, a relative of the Prosecutrix. At the end of the Prosecution case, since the Court was convinced of the availability of a case for the Prosecution, acting under **Section 231** of the **Criminal Procedure Act of 2009**, Defense was called from the Accused and all the available options were explained to the Accused. At this juncture, the Accused gave evidence for the Defense under cross-examination. At the end of the Defense case, the Court heard oral submissions from Counsel representing the Prosecution and the Defense. Having carefully considered the evidence presented at the trial, this Court will now proceed to pronounce the judgment in this matter, as below:

Element of the offences

3. For the Accused to be found guilty of the 1st count of Rape in the present case based on **Section 207 sub sections 1 and 2(b)** of the **Crimes Act of 2009**, Prosecution must prove beyond reasonable doubt, the following elements;
- (i) The Accused;
 - (ii) Penetrate the vagina of the Prosecutrix with his penis;
 - (iii) The Prosecutrix did not consent to the Accused to penetrate her vagina with his Penis;
 - (iv) The Accused knew or believed or was reckless that the Prosecutrix was not consenting for him to insert his Penis to her Vagina. The slightest penetration of the vulva of the Prosecutrix by the Penis of the Accused is sufficient to satisfy penetration.
4. In further elaborating this offence under **Section 207 (2) (a)** of the **Crimes Act 2009**, the offence of Rape is defined as follows: *a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent.* In the context of this case, 'carnal knowledge' encompasses an act of penetration of the vagina or the anus of the Prosecutrix with the Penis of the Accused. A slightest penetration is sufficient to prove the element of penetration. According to **Section 206** of the **Crimes Act of 2009**, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. In this regard, consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.
5. For the Accused to be found guilty of the 2nd count of Sexual Assault contrary to **Section 210 (a)** of the **Crimes Act of 2009**, Prosecution must prove beyond reasonable doubt, the following elements;
- (i) The Accused
 - (ii) Unlawfully and Indecently Assaulted
 - (iii) The Complainant

Burden of proof

6. The Accused is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The prosecution must prove the Accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the Court was not sure of the guilt of the Accused, or if there be any hesitation on the part of this Court of the establishment of the ingredients or on the of evidence led by the Prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has given evidence in this case. Thus, if this court accepts the defence evidence or is unable to reject or accept the defence evidence, then too the Accused is entitled to a finding in his favour.

Prosecution Case

7. For the Prosecution, two witnesses gave evidence. As the Prosecution witness 1 the Prosecutrix gave evidence under oath. She appeared matured as she took to the stand. Giving evidence in Court, she testified, as below:

- “My name is Fiona and now I am 21 years old. I reside in Tuirara Makoi and currently I stay at home and I am married.
- In 2018 December I was living in 9 miles with Fariza and Daniel.
- Fariza and Daniel are my cousin sister and brother in law. Daniel is Daniel Singh.
- Daniel is married to Fariza. I can't remember when I started living with Daniel and Fariza. When my father passed away I started living with them. At that time Neha and her sister were also living there. Also their grandmother was living there.
- While living with them I had a good relationship with them. If I had any problem while living there, I had no one to tell that.
- When I was there, Daniel's daughter was small. She was staying at home. I was looking after her every day. I was feeding her and providing cloths. Her cloths were in the room of Fariza and Daniel.
- When I was looking after the baby Fariza used to work at Tapoo city and left home to work at about 6 a.m. and came back at 7 pm. She did this every day of the week.
- When Fariza goes to work Daniel used to go to work at Memzab, Daniel will leave to work at around 7 am and come back at around 4 pm. Fariza and Daniel sometimes go to work together and come back together. Daniel worked on Saturdays, as well.
- Daniel's grandmother was not able to walk around. She just sat with me in the sitting room. .
- In December 2018, I was 17.
- We lived in a cement house and it was orange in colour. This house had 4 bed rooms. Kitchen was on the right hand side of the sitting room. When you enter this house you first go to the sitting room. Daniel's room is in front of the sitting room. My room is at the back myself and Neha sleep in this room, also the grandmother's room is also celseby.
- Shanaya was their daughter and she slept with Daniel and Fariza. Neha was Daniel's sister. She was older than me. I can't remember what she was doing.
- From Daniel's house I moved to my brother's house because Fariza and Daniel beat me and threatened to kill me because I beat Shanaya.
- While I was living with Daniel he misbehaved. Daniel squeezed my breasts. I can't remember when. I asked him not to do that. At this time I was in the sitting room sweeping the house. There was no one in the house then. I was wearing a black skirt and a white top.
- Daniel pressed my breast hard. He then kissed me on my lips. He removed my skirt and panty and inserted his penis at the bottom. That is my pussy. This is where we do in the wash room. That is where I urinate.
- He inserted the entire penis. This happened in the back room of Neha and myself.

- When this happened I was looking after Shanaya. When Daniel did this Shanaya was with me in the room, since she was playing with me. No one else was there in the room and in the house.
- I was having my menses at that time. After that I went to the shower.
- I only informed my sister in law, Romika Lata, who lives in Nabouwalu. I told her that Daniel did this when I was moved to her house after this incident.
- Daniel squeezed my breast for a long time. Daniel inserted the penis and removed it after sometime.
- I was angry when Daniel did this. I was facing Daniel when Daniel did this. This happened after lunch.” **Witness points to the accused and identifies the Accused in the dock.**

8. In cross examination, this witness was challenged by the Defense in relation to the incident she claimed. It was the Defense position that the Accused did not insert his penis to her vagina and she made a false complaint against the accused. In this regard, this witness confirmed that her mother lives in New Zealand and she came to Fiji and beat her in front of Daniel’s house, on the premise that she had made a false complaint against the Accused. As a result, though she went to the Nakasi police station to withdraw the complaint, it was not a lie but the truth.
9. In observing the demeanor and deportment of this witness, though this Court observed that the Prosecutrix has had a troubled childhood in the absence of her parents with her to guide her in growing up, this Court had no reasons to disbelieve the evidence given by the Prosecutrix in Court. She explained the events that took place in her own language to the best of her ability.
10. The second Prosecution witness (PW2) was **Romika Lata**, the sister-in-law of the Prosecutrix. According to her, she lives in Nabouwalu and Fiona came to her house on a Saturday, where she was dropped by Fariza, the wife of the Accused, which happened suddenly. The following night Fiona had come to her and told her that at Daniel’s place, Daniel has had intercourse with her. Being shocked by this, she had told her husband to inform her mother in New Zealand. She confirmed that before Fiona came to her she was at Daniel’s place, and when she came to her she had been 17. The evidence of this witness corroborated the evidence of the Prosecutrix of complaining to her sister-in-law of the incident in issue.
11. At the end of the Prosecution, since this Court was convinced that a prima-facie case was established, acting under Section 231 of the Criminal Procedure Act of 2009 the Defense was called and the Accused was explained of the all the available options for the Defense.

Defense Case

12. For the Defense case, the Accused opted to give evidence and no other witnesses were called. In giving evidence, the Accused stated, as follows:
 - “I, my wife, Fiona, my daughter and Neha were living in my house during the alleged incident.
 - Neha was sleeping in the back room.
 - We had 4 rooms, partitions were made of Bristol board.
 - Myself and my wife went and came back from work in my car together.
 - If I don’t go to work my wife also doesn’t go to work and vice versa.
 - Fiona mentioning me raping her is a lie and also me squeezing her breasts is a lie too.
 - She had lied like this because we gave her a home for 4 years and when I heard that she was always on the phone and not giving attention to my child my wife reprimanded her.

- My neighbor Naz came one day and started fighting and asking for Fiona. When my wife inquired about this and when questioned we realized that she had been having contacts with her husband. In the photos sent by Fiona to her husband she was showing her breasts.
- She wanted to beat Fiona, but my wife sent her away.
- My wife beat Fiona and Fiona was taken to Nabouwalu because she failed to look after my daughter.
- In Nabouwalu Fiona had said fake stories to her sister-in-law.
- This matter had been reported by Fiona's mother who was living in New Zealand.
- I met Fiona's mother in front of my house, Shabnam came home and beat Fiona.
- When this was happening Fiona said that she was lying about me raping her.
- Then they wanted to withdraw this matter at the police station, but that didn't eventuate.
- I always used to take Neha and my grandmother to places in my car.
- These allegations of Fiona are false"

Analysis and Finding of Court

13. In this matter, the Prosecution claims that she was raped and sexually Assaulted by the Accused between 14th January 2019 and 31st January 2019. Shortly after the incident, the Prosecutrix had informed of this incident to her sister-in law when she was handed over to her brother by the wife of the Accused, which has resulted in making a complaint to the police and instituting this action against the Accused. In this regard, this Court notices that the Prosecutrix had complained of this incident the moment she had access to an independent adult devoid of any connection to the Accused.
14. On the contrary, the Defense claimed that the allegation of Rape and Sexual Assault made against the Accused by the Prosecutrix was made by the Prosecutrix for vengeance, since she was reprimanded by the Accused and his wife for her mischievous conduct and not giving due attention to their child. Therefore, this is a case where the Court has to accept one version of events against the other in reaching the final determination. However, this Court is mindful that the Prosecution has to prove the case beyond reasonable doubt and that burden never shifts to the Defense.
15. In considering the evidence given by the accused under cross-examination, the accused claimed his family reprimanding the questionable conduct of the Prosecutrix to be the reason for her to make this false complaint against him. However, when the version of the Accused was put the Prosecutrix by the Defense during cross-examination, this Court observed the Prosecutrix holding her ground denying the allegations raised by the Defense, though she admitted that there were attempts and pressure on her to withdraw her complaint even with the involvement of her mother who was residing in New Zealand.
16. Through the evidence led in this matter, it was demonstrated that the Prosecutrix was housed for 4 years at the residence of the Accused after the demise of the father of the Prosecutrix. Further, as claimed by the Prosecutrix, she has had a very good relationship with Daniel and his wife during this period, a position that was not challenged by the Defense. According to the Accused, this cordial relationship has become sour resulting in the wife of the Accused taking the Prosecutrix to the house of her brother in Nabouwalu only when they realized the paucity of care given to their daughter in late January 2019. Ironically, as claimed by the Prosecutrix, lack of care to the daughter has been realized by the Accused and his family immediately after the alleged incident of Rape and Sexual Abuse of her by the Accused.

17. In this background, this Court finds it difficult to give credence to the version of the Accused in accepting and formulating the trajectory of events that has taken place in this matter, as claimed by the Prosecution and the Defense. Therefore, on careful consideration, this Court rejects the evidence given by the Accused in this matter.
18. Considering the elements that needs to be established in this matter in relation to rape, firstly there is no doubt in relation to the identity of the Accused. As per the second and third elements, Prosecutrix has informed this Court that the Accused inserted his penis to her vagina for which she was angry meaning not happy. The anger expressed by the Prosecutrix for the actions of the Accused depicts the Accused knew or believed or was reckless that the Prosecutrix was not consenting. In this sense, all the required elements for rape has been established by the Prosecution in this matter through the evidence of the Prosecutrix. In relation to the second count of Sexual Assault also the required three elements, as highlighted above, have been established through the evidence of the Prosecutrix, where she has stated that the Accused squeezed her breasts against her protest.
19. Therefore, on the above analyzed facts, this Court finds the Accused guilty of counts 1 & 2 as charged by the information filed in this Court by the Prosecution.
20. Parties have 30 days to appeal to the Fiji Court of Appeal



A handwritten signature in black ink, appearing to read "Thushara Kumarage", written over a horizontal dotted line.

Hon. Justice Dr. Thushara Kumarage

At Suva
05th of October 2022