

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 052 OF 2020**

**BETWEEN** : STATE

**AND** : DINESH KUMAR

**Counsel** : Ms A Vavadakua for the State  
Mr K Prasad for the Accused

**Date of Hearing** : 31 October, 1 November – 3<sup>rd</sup> November 2022

**Date of Judgment** : 18 November 2022

**JUDGMENT**

**Charges**

- [1] The accused is charged with one count of penile rape [s 207(1) (2)(a) Crimes Act], one count of digital rape using finger [s 207 (1) (2)(b) Crimes Act] and one count of breach of order suspending sentence [s 28(1) of the Sentencing and Penalties Act].

**Burden and standard of proof**

- [2] The prosecution carries the burden to prove each charge beyond reasonable doubt. This burden never shifts on the accused. The accused is not required to prove anything.

[3] **Elements of offence**

To prove penile rape as alleged on count one, the prosecution must prove the following elements:

1. That on the said date and place the accused intentionally had sexual intercourse with the complainant, that is, he penetrated the vagina of the complainant with his penis.
2. That the complainant did not consent to sexual intercourse.
3. That the accused knew the complainant did not consent.

[4] To prove digital rape as alleged on count two, the prosecution must prove the following elements:

1. That on the said date and place the accused intentionally penetrated the vagina of the complainant with his finger.
2. That the complainant did not consent to the penetration.
3. That the accused knew the complainant did not consent.

[5] Slight penetration is sufficient and it is not necessary to prove that the accused ejaculated during sexual intercourse. A person has intention with respect to conduct if he or she means to engage in that conduct.

[6] To prove breach of order suspending sentence, the prosecution must prove the following elements:

1. That on the date alleged, the accused was serving a suspended sentence of imprisonment for an offence; and
2. That he committed another offence punishable by imprisonment.

[7] On count 3, the accused does not dispute that on 22 January 2020 he was actively serving a suspended sentence for an offence. The real issue is whether he committed another offence punishable by imprisonment during the operational period of his suspended sentence.

### **Agreed facts**

[8] The following facts are agreed:

The identity of the complainant and her age. She was 15 years old at the time of the alleged offence.

The accused is related to the complainant – he is her paternal grandfather (his son is the complainant's stepfather).

The accused was caution interviewed on 23 January 2020.

### **Prosecution case**

[9] The prosecution led evidence from seven witnesses and tendered the following exhibits:

Complainant's medical report (PE 1).

Photographic booklet of alleged crime scene (PE 2).

Charge statement of the accused (PE 3).

Record of interview of the accused (PE 4).

Suspended sentence order of the accused (PE 5).

[10] It is not necessary to recite the evidence in detail. I will summarize the salient features of the evidence as they relate to the charges.

[11] In relating to the allegations of rape the complainant said that in the afternoon of 22 January 2020 when she returned home from school the entrance door to her house was open and that she thought her parents were at home. She went straight to her room to change her school uniform. She did not lock the door to her room. As she was taking out her school uniform her grandfather the accused entered her room and tied her mouth with a cloth (top). He pushed her shoulders and she landed on the bed facing up. He came on top of her and started to undress her. He removed her uniform and undergarments. He undressed himself and used his penis in her vagina. He also used his finger inside her vagina. The complainant said that she was crying when that happened. She could not scream because her mouth was tied. He told her not to tell anyone. When he left the room she untied

herself and went to her aunt, Meha's home which was close to her house. She told her aunt that her grandfather the accused had raped her.

- [12] The complainant's aunt gave evidence saying that in the afternoon of 22 January 2020, the complainant came to her house looking scared and was crying. The aunt said that the complainant told her that her grandfather the accused had raped her. The aunt accompanied the complainant to the complainant's farm where her mother and stepfather were working.
- [13] The complainant's mother gave evidence that in the afternoon of 22 January 2020, the complainant accompanied her aunt to their farm in a distressed condition. After a conversation with the complainant she immediately took the complainant to Muaniweni Police Post.
- [14] Dr Rabici medically examined the complainant on 23 January 2020 at around 11 am. Upon physical examination of the complainant's vagina the doctor found fresh laceration and cuts in the vagina that were consistent with penetration. The complainant's vaginal hymen was not intact. (PE 1)
- [15] In his record of interview (PE 4) the accused admitted having sexual intercourse with the complainant for five minutes but he denied gagging her mouth with cloth or digitally penetrating her vagina with his finger. In his interview he apologized to the complainant for what he had done to her. During the interview he accompanied WDC Ram to the alleged crime scene and pointed out to the police the room in which the incident took place (PE 2).
- [16] After the interview was concluded the accused was formally charged with two counts of rape. In his charge statement the accused offered an apology to the complainant and her stepfather (his son) for what he had done to the complainant (PE 3).

[17] WDC Ram also tendered the original order made by the Magistrates' Court partially suspending the accused's sentence for an offence of indecent assault for three years effective from 30 April 2018 (PE 5).

### **Defence case**

[18] The accused in his evidence denies the allegations. He said that the complainant has fabricated the allegation of rape after he counselled and discouraged her from having a boyfriend. He said that in the afternoon of 22 January 2020 he was at his home after working in his farm. He did not go to the complainant's home or do anything to her as alleged by her. He said that he was assaulted by police when they arrested him. When he was questioned at the police station he was afraid and that is why whatever came in his mind he told the police.

### **Analysis**

[19] The accused chose to give evidence. However, he does not have to prove anything. If the account given by him is or may be true, then he must be found not guilty. But even the account given by him is entirely rejected, that would not relieve the prosecution of its burden of making sure by evidence of the accused's guilt.

[20] I am mindful that special measures were used to receive the complainant's evidence. The purpose of the special measures was to put the witness at ease when giving evidence and not to prejudice the accused. I approach her evidence dispassionately, without sympathy or prejudice.

[21] The prosecution relies upon the complaint made to the aunt shortly after the alleged incident to show consistency on the complainant's account. The complaint made to the aunt, of course, is not independent evidence of what happened between the complainant and the accused, and it therefore cannot of itself prove that the complaint is true. But the recent complaint evidence may show consistency when deciding whether the complainant is a truthful witness.

- [22] Further, the prosecution relies upon the admissions made to police by the accused in his caution interview and charge statement as corroborative evidence. The complainant's evidence need not be corroborated in order to be believed. But if the admissions of the accused are true then they support the complainant's account that the accused had sexual intercourse with her, without her consent.
- [23] I believe the evidence of the complainant. I do not believe that the complainant has fabricated the allegation of rape as suggested by the accused. The complainant struck me as an honest and truthful witness. At times she was reluctant and shy to give every detail of the alleged incident, but that is understandable given the cultural constraints of giving evidence of sexual nature.
- [24] I believe the complainant's account that the accused had gagged her mouth with a cloth to prevent her from raising alarm before penetrating her vagina with his penis and with his finger. I believe her account that she did not consent to sexual penetration of her vagina. She immediately complained to her aunt. The injuries found in her vagina is consistent with her account that a sexual penetration had taken place. The accused's admission of sexual intercourse supports her account of sexual intercourse. I accept that the accused's admissions are true. I do not accept the accused's account that he made the admissions out of fear of police assault. I do not believe the accused's account that at the time of the alleged incident he was at his home.
- [25] On count one, I am satisfied beyond reasonable doubt that on 22 January 2020 at Muaniweni the accused penetrated the vagina of the complainant with his penis without her consent and that he knew she did not consent.
- [26] On count two, I am satisfied beyond reasonable doubt that on 22 January 2020 at Muaniweni the accused penetrated the vagina of the complainant with his finger without her consent and that he knew she did not consent.

[27] On count three, I am satisfied beyond reasonable doubt that on 22 January 2020 the accused was serving a suspended sentence of imprisonment for an offence and that he committed another offence punishable by imprisonment, namely, rape.

**Verdict**

[28] The verdict of the Court is:

Count 1 – Guilty – Convicted of Penile Rape.

Count 2 – Guilty – Convicted of Digital Rape.

Count 3 – Guilty – Convicted of Breach of Order Suspending Sentence.



A handwritten signature in black ink, consisting of stylized initials and a long horizontal stroke.

.....  
**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused