

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 82 of 2022

STATE

vs.

ABDUL RIAZ SHAMIM

Counsel: Mr. J. Singh for the State
Ms. N. Ali for Accused

Date of Hearing: 27th and 30th March 2023

Date of Closing Submission: 30th March 2023

Date of Judgment: 05th April 2023

JUDGMENT

1. The name of the Complainant is suppressed.
2. The Accused is charged with one count of Sexual Assault, contrary to Section 210 (1) (a) 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 1

Statement of Offence

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

Particulars of Offence

ABDUL RIYAZ SHAMIM *on the 18th day of February 2022 at Nabua in the Central Division, unlawfully and indecently assaulted FA, by kissing her neck, face and breast.*

Count 2

Statement of Offence

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

Particulars of Offence

ABDUL RIYAZ SHAMIM *on the 18th day of February 2022 at Nabua in the Central Division had carnal knowledge of FA, without her consent.*

3. The hearing commenced on the 27th of March, 2023. The Accused did not appear for the hearing. Having satisfied that the Accused had been adequately informed about the date, time and place of the hearing, but still he chose not to attend the hearing, the Court proceeded with the trial in the absence of the Accused. The hearing was concluded on the 30th of March, 2023. The Prosecution called four witnesses, including the Complainant. Subsequent to the Prosecution's evidence, the Court found no evidence to establish the first count of Sexual Assault as charged in the Information; hence, I acquitted the Accused of the same pursuant to Section 231 (1) of the Crimes Act. Afterwards, the learned Counsel for the Prosecution and the Defence filed their respective written submissions. Having perused the evidence presented during the hearing and the respective written submissions, I now pronounce the judgment on this matter.

Burden and Standard of Proof

4. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

Elements of the Offences

5. The main elements of the offence of Rape as charged under first count are that:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his penis,
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his penis,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.
6. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed this offence against the Complainant.
7. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the Accused is sufficient to prove the element of penetration.
8. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without

physical resistance by the Complainant to an act of another person shall not alone constitute consent.

9. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.

Prosecution's Case

10. The Complainant was 14 years old in 2022 and attending school. She was living with her mother and other siblings. The Accused is a known person to her family as he usually helped them. Her mother considered him as a son, and the Complainant called him a brother. He is a Muslim priest.
11. On the 18th of February 2022, the Accused came to the Complainant's home, saying that he came to visit another person in the neighbourhood and then decided to visit them too. He conversed with the Complainant's mother and then inquired about the Complainant. He then offered to take her to buy bread. The Complainant got into his car and went to buy bread with him. After buying bread, the Accused suggested the Complainant to go to his place and show her his mobile phone. He then took her to the place where his mother works. It was a room with a table, chair and certain children's toys. While she was looking at his laptop at the table, the Accused pulled her neck with his hand. The Complainant removed his hands from her neck. He tried to do it several times, but the Complainant repeatedly removed his hand. The Accused then went to another room, changed his religious clothes, and wore shorts and a t-shirt. He then brought a mattress, pillow and a sheet and asked the Complainant to sit on it. While she was on the mattress, setting the mobile phone given by the Accused, he made her lie on the mattress and locked her hands and body from his hands, not letting her move or get away from the mattress. He then removed his clothes as well as hers. The Accused then penetrated her vagina with his penis. The Complainant felt dizziness and

regained her senses, and realized what was happening to her. She felt pain in her vagina. The Complainant then pushed him away from her legs as he still locked her hands, preventing her from moving. She somehow managed to push him away with her legs. She then got up and dressed up. The Accused then tried to hold her from her behind. He then took her out of the room. She then tried to run away, but he managed to stop her. The Accused then took her home in his car.

12. On their way home, the Accused had told the Complainant not to tell anyone about this incident. The Complainant did not tell her mother anything when she returned home. However, the following day, she told her mother about this incident. Her mother then took her to the Police Station to report this matter.
13. The Complainant knew the Accused as he visited her place often and considered him a brother. She called him Ayaan, but his real name is Abdul Riaz Shamim. The fourth Prosecution witness WDC Lusiana confirmed the name of the Accused in her evidence. The Complainant specifically stated that she removed the Accused's hand when he pulled her neck. Considering her evidence that she considered the Accused as a brother, I do not find any fault in Complainant going with him to his place to see his mobile phone. The Complainant's mother, in her evidence, said she considered the Accused as a son. In view of the close relationship the Complainant and the Accused had, the fact, the Complainant went to the Accused's place alone with him in the night and remained inside a room with him, checking his laptop and mobile phone do not create any doubt whether the Complainant consented to this alleged sexual intercourse.
14. The Complainant specifically said that the Accused held her tightly, preventing her from moving or escaping when he penetrated her vagina with his penis. She somehow managed to push him away and tried to run away when she came out of the house. This evidence establishes that she did not consent for the Accused to penetrate her vagina with his penis.
15. Considering the above reasons, I find the Prosecution proved the second count of Rape as charged in the Information beyond a reasonable doubt. Therefore, I find the Accused guilty

of the second count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act, and convict to the same accordingly.



A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a horizontal line and a vertical stroke.

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

05th April 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.