

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO : HAC 157 OF 2019

STATE

v

KUNAITAQELE NAYARAVORO

Counsel : Mr T. Tuenuku for State
Ms P. Reddy with M. Pillay for Defence

Dates of Hearing: 19, 20 & 27 September 2023

Date of Judgment: 29 September 2023

(The name of the complainant is suppressed. She is referred to as MN)

JUDGMENT

1. The accused is charged with three counts of Rape and two counts of Indecent Assault. The information reads as follows:

COUNT ONE

Statement of Offence (a)

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

Particulars of Offence (b)

KUNAITAQELE NAYARAVORO, on the 5th day of July, 2019 at Sigatoka, in the Western Division, unlawfully and indecently assaulted MN, by fondling her breasts.

COUNT TWO

Statement of Offence (a)

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

Particulars of Offence (b)

KUNAITAQELE NAYARAVORO, on the 5th day of July, 2019, at Sigatoka, in the Western Division, touched the vulva and/or vagina of MN, without her consent.

COUNT THREE

Statement of Offence (a)

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

Particulars of Offence (b)

KUNAITAQELE NAYARAVORO, on the 12th day of July 2019, at Sigatoka, in the Western Division, unlawfully and indecently assaulted MN, by fondling her breasts.

COUNT FOUR

Statement of Offence (a)

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

Particulars of Offence (b)

KUNAITAQELE NAYARAVORO, on the 12th day of July, 2019, at Sigatoka, in the Western Division, touched the vulva and/or vagina of MN, without her consent.

COUNT FIVE

Statement of Offence (a)

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

Particulars of Offence (b)

KUNAITAQELE NAYARAVORO, on the 12th day of July, 2019, at Sigatoka, in the Western Division, had carnal knowledge of MN, without her consent.

2. On counts two, four and five, the accused is charged with Rape. On counts two and four the Prosecution alleges that the accused penetrated the complainant's vagina or vulva with his finger without the complainant's consent. On count five, the accused is charged with carnal knowledge. To prove carnal knowledge, the Prosecution must establish that the accused

penetrated the complainant's vagina with his penis without the complainant's consent. A slightest penetration is sufficient to prove the element of penetration.

3. According to Section 206 of the Crimes Act, 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. A consent obtained by force, threat or intimidation etc. will not be considered as consent freely and voluntarily given. To establish the fourth element of Rape, the Prosecution must prove that the accused knew or believed that the complainant was not consenting or that he was reckless as to whether the complainant was consenting or not.
4. On counts one and three, the accused is charged with Indecent Assault. To prove these charges, the Prosecution must prove that the accused unlawfully and indecently assaulted the complainant.
5. The accused pleaded not guilty to all the charges. At the ensuing trial, the Prosecution presented the evidence of the complainant and her mother.
6. At the end of the Prosecution case, the Court found that there was sufficient evidence to maintain counts one, three and five and therefore, the accused was put to his defence. However, on counts two and four the Court found no evidence to maintain a charge of Rape. Therefore, the accused was found not guilty of Rape on those counts and was acquitted. However, the Court found that there was sufficient evidence to maintain the charges for a lesser count of Sexual Assault or Indecent Assault. Having put the accused to his defence, the Court explained his rights in his defence. The accused exercised his right to give evidence under oath.
7. The counsel from both sides tendered written and oral submissions. Having carefully considered the evidence presented at the trial and the submissions made by the counsel, I now proceed to pronounce my judgment as follows.

8. The Prosecution bears the burden to prove all the elements of each offence and that burden must be discharged beyond reasonable doubt. The burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond reasonable doubt. The accused is under no obligation to prove his innocence or prove anything at all.
9. I shall now summarise the salient parts of evidence led in this trial.

PW 1: MN (The Complainant)

10. In July 2019, MN was 16 years old and still schooling. She was staying at Bara, Sigatoka with her parents and her four brothers in a three-bedroom house. Her eldest brother was 14 years old. The accused, Kunaitaqele Nayaravoro (Taqele) also came to stay with them because he was attending the same church as them and was staying with them for nearly one year when the alleged incidents occurred. MN's parents occupied one bedroom of the house, she occupied the second bedroom, and the third room was shared by her brothers and Taqele.
11. On 5 July 2019, at around 6 p.m., her mother was preparing dinner in the kitchen and her father had gone to work. MN was in the living room with her siblings, assisting them with their homework. Taqele came from his room and wanted to borrow her mother's phone. So, MN went to her mother to ask for the phone and gave it to Taqele. Taqele went inside his room to make a call. Her mother then told her to get the phone back from Taqele. When MN went inside Taqele's room to ask for the phone, Taqele called her inside the room and sit beside him on the bed. She sat on the bed, but far from him.
12. The door of the room was open, but it had a curtain covering the entrance. Taqele pulled her closer to him and started touching her breasts on top of her clothes. He then moved his hand lower and touched her private part, in front of her vagina, on top of her clothes. She did not agree with what Taqele was doing. She told him not to do that, but he kept on touching her. As soon as he started touching, she stood up and walked into the living room and sat. She

did not tell her mother or anybody else at that point in time what Tazele had done to her. She was scared to inform her mother, but she had no reason not to tell her mother.

13. On 12 July 2019, at around 8 p.m., she was home and watching movies in the living room with her brothers and Tazele. Her parents went for a prayer meeting at Malaqereqere church. Tazele went to her bedroom and called her inside the room. She went inside the room as he wanted to show something to her inside the room.
14. As she entered the room, Tazele pulled her into the room and made her lie down on the floor. He then started touching and pulled her trousers down. He started off fondling her breast and then put his hand inside her pantie and started touching her private part (vagina) on top of it. Then he pulled down her pants and the pantie together. He covered her mouth with one hand and started to remove his trousers with the other. After removing her trousers, he started to have sex with her by putting his penis inside her vagina for 2–3 minutes. She did not agree with what Tazele was doing to her. As soon as he took off his clothes, she pushed him back, but he still came over her. When they were having sex, the door was open. Once he was done, she stood up, put on her trousers and went back to the living room where her brothers were. Tazele too came out of the room.
15. MN did not tell her brothers what Tazele did to her because they were still young. Her parents had returned home at around midnight when she was sleeping. In the morning, she did not tell her parents what Tazele had done to her because Tazele had told her that if she was going to inform someone then he was going to say that she was the one who initiated it.
16. Her mother finally came to know of what Tazele did to her from one of the church members whose daughter saw Tazele hugging her in the room on 6 July 2019. In August, upon being questioned by her mother, she told her mother everything Tazele did to her. Her mother told her to go to the police station and report the matter. She and her mother went to the police station in August 2019. She was medically examined at the hospital.

17. Under cross-examination, MN agreed that, in 2019, Taquele was friendly with her, and that he had behaved in a very appropriate manner towards her and her family members at home. Her parents trusted him so much by leaving her and her siblings with him at home. MN agreed that her friendship went to another level where they both started liking each other to the extent that they both started loving each other. At times, she and Taquele used to attend church together. She then said that she wasn't in any relationship with Taquele because she never liked him.
18. MN agreed that on 5 July 2019, when the first incident happened, her mother was cooking in the kitchen right opposite Taquele's room. MN said that she sat on the bed at arm's length where Taquele was sitting. Having denied that she was pulled towards Taquele, she said that he just took her hand and told her to come closer to him. She agreed that she could have alerted her mother. She agreed that she did not shout or alert her brothers who were in the living room because she did not want to shout or alert anybody. She agreed that Taquele never threatened her and that there was no reason for her to fear at that time to complain to her mother. She just removed his hand when he touched one of her breasts. She didn't immediately leave the room because he pulled her back. She was just pushing him away. When he fondled her breast and touched her private part, she knew it was inappropriate.
19. MN agreed that on 6 July 2019, her friend Litiana saw Taquele pulling her and hugging her when Litiana entered the room. On that day, she went inside Taquele's room because he was calling her to his room. She agreed that if anything happened on the 5th as alleged, she would not have gone inside Taquele's room. She agreed that when Taquele hugged her on the 6th, she did not complain to her mother. She was not scared of Taquele's warning that he would tell everyone that she was the one who initiated it because she didn't know that Litiana would tell her mother what she saw on 6 July 2019.
20. MN agreed that on 12 July 2019, she went inside the room when Taquele called her despite knowing that her parents were not home. She agreed that she didn't shout for help by trying to alert her brothers. The reason was that her mouth was covered. She did not complain

because she feared Tazele would change his story. She agreed that her mother was not a very strict person.

21. MN first denied that, on 18 August 2019, she and Tazele were sitting together in the church. Then she agreed they were sitting together but denied having any relationship. Her mother found out about her and Tazele on 21 August 2019 when Litiana's mother told her mother. She admitted that when she was questioned by her mother, she denied at first having had sex with Tazele and agreed only when her mother kept confronting her. Her mother was angry that she did not tell her straight after what Tazele had done to her. She admitted that she could have refused to go into the room when Tazele was calling her to show something in the room.

PW2 - Adi Losana Naimasi

22. Adi Losana is MN's mother. In 2019, Tazele was residing with her family because they were in the same church congregation. She always regarded Tazele as her elder son and maintained a good relationship with him.
23. When she was home on 21 August 2019, Buna came to see her at around 8 p.m. and informed her what she heard from her daughter Litiana. She called MN and asked her what Tazele did to her. MN kept quiet. She wanted MN to tell her what had happened straight because she was hiding it. She slapped on MN's face. After she slapped her, MN informed her what had happened. MN said that Tazele had fondled her breasts and touched her private part, so she pushed Tazele's hands away. When she asked MN if she was telling the truth, MN was a bit shocked, and she almost collapsed. She then called Tazele and asked him whether he had done something to MN. Tazele agreed and said that he would come home and tell her what had happened. But Tazele never came.
24. Under cross-examination, Adi Losana said that she was home on 5 July 2019 and 6 July 2019, but she did not notice anything unusual between MN and Tazele. MN did not tell her

anything until she had asked MN on 21 August 2019. Right after MN answered the question, she slapped her. MN did not tell her that she did not want to go to the police station.

Defence Case

DW1- Kunaitaqele Nayaravoro (Taqele) The accused

25. As of 5 July 2019, Taqele had been residing in Bara with MN's family for nearly a year. He was in a boyfriend-girlfriend relationship, but her family did not know about it. MN used to sleep with her brothers, and he also slept in the same room.
26. On 5 July 2019, when he was lying down in his room at around 6 p.m., MN came inside his room. He hugged MN because they were in a relationship. She did not want him to hug her because she was concerned that her mother or her siblings would enter the room. He put one of her hands on her chest and the other on her private part. She pushed him because she was scared that someone might see them.
27. On 6 July 2019, in the evening, he was in the same room. MN came inside the room and he hugged her. Litiana saw them, so he went outside.
28. On 12 July 2019, he was lying down in the same room. MN's parents went to the church for a prayer meeting. MN suggested that they have sex, but she was worried that her siblings would enter the room. That was the reason why she was pushing him. He did not close her mouth. They had sexual intercourse for about 2 to 3 minutes. After that, she went back into the living room. After this incident, he continued to live in the same house. He did not notice anything abnormal in MN's behaviour towards him. She did not want her mother to know that they were in a relationship because she was the one who had insisted on the relationship.
29. On 21 August 2019 when he went to his house, he received a call from MN's mother and asked angrily what he had done to MN. He realised that MN had changed the story. He told her to wait for him to come home so he could tell the truth. Nevertheless, MN's mother had

gone to the police station the same night. He said that everything happened with MN's consent.

30. Under cross-examination, Taquele agreed that he is 10 years older and more mature than MN. He agreed that it was wrong to have sexual intercourse with a minor. He had sex with MN because she wanted to. She was pushing him because she was scared that her siblings would enter the room. MN said- *be careful the kids might enter the room and see them*. MN's parents had allowed him to use MN's room.

Evaluation / Analysis

31. It is admitted that the accused penetrated the vagina of the complainant on 12 July 2019 with his penis. It is also admitted that he fondled her breasts on 5 July 2019 and on 12 July 2019 on top of her clothes and that he touched her naked vagina on 12 July 2019. It is the position of the Defence that the accused was engaged in those conducts with the consent of the complainant.
32. There is no dispute that the accused was staying at the complainant's house approximately one year prior to and during the period of the alleged offences. The case for the Prosecution is that the accused was engaged in those conducts without the complainant's consent. The accused on the other hand says that he was in a boyfriend-girlfriend relationship with the complainant and that everything happened with the complainant's consent. The case turns on one word against the other. However, the accused has no burden to prove that the complainant consented. The Prosecution must prove the lack of consent beyond a reasonable doubt.
33. In Fiji, no corroboration of the complainant's evidence is required to prove a charge of a sexual nature. Therefore, the duty cast on the court to closely scrutinize each piece of evidence to ensure that no miscarriage of justice ever occurs. In a case like this, which turns solely on one word against the other, that duty is greater.

34. Let me analyse the evidence of the complainant first. On the issue of whether the complainant and the accused were in an intimate relationship at the time of the alleged offences, I find the evidence of the complainant to be inconsistent. There is no dispute that the complainant and the accused went to church together. She agreed that her friendship went to another level where they both started liking each other to the extent that they both started loving each other. Then she contradicted her own evidence and said that she wasn't in any relationship with the accused because she never liked him.
35. The accused continued to live in the same house with the complainant from the last alleged incident which occurred on 12 July 2019 until 21 August 2019. The complainant's mother had not noticed any unusual behaviour from either of them nor did she receive any complaint from the complainant. The complainant first denied that she was sitting in the church on 18 August 2019. Then she agreed that she was sitting in the church but denied having been in a relationship with the accused.
36. Then I turn on to the alleged incidents. The first alleged incident occurred on 5 July 2019. At the time of this alleged incident, the complainant's mother was in the kitchen which is located right opposite the room where the incident occurred. The door to the room was open and the only thing that was covering the room was the curtain. The complainant's siblings, the eldest of whom was 14 years old, were in the living room. The reason she had gone into the accused's room was to get her mother's phone back from the accused. She says that the accused pulled her closer to him and started touching her breast and her vagina, on top of her clothes. How did the accused acquire the courage to do all these things when her mother was in the kitchen right opposite the room? How did he be so confident that the complainant would never raise an alarm alerting her mother? The plausible answer to these questions would be that the accused knew that the complainant would never raise alarm because of the relationship they were already in.
37. The complainant says that she did not agree with what the accused was doing and that she told him not to do those things, but he kept on touching her. As soon as he started touching, she said she stood up and walked into the living room and sat there. No alarm was raised.

She did not complain to her mother or anybody else at that point in time. She agreed that she could have alerted her mother. She agreed that she did not shout or alert her brothers because she did not want to shout or alert anybody. She agreed that the accused never threatened her and that there was no reason for her to fear at that point in time to complain to her mother.

38. Under cross-examination, the complainant was not consistent with what she had told in her examination-in-chief. Having denied that she was pulled towards the accused, she said that he just took her hand and told her to come closer to him.
39. Let me next analyse the complainant's evidence on the second alleged incident that occurred on 12 July 2019. Her parents had gone to church that evening leaving the children home with the accused. The accused went to the complainant's bedroom and called her inside to show 'something' to her. She went to the room without any hesitation. She knew that her parents were not home. Through her experience, she knew what kind of a person the accused was. She knew that the accused's past conduct of fondling her breast and touching her vagina was not appropriate and not tolerable and the accused did all those acts without her consent. She admitted that she could have refused to go into the room. Still, she went. The question is why did she respond to his call and go into the room when her parents were away?
40. The door was open when the sexual intercourse took place. Her brothers were in the living room. She agreed that she didn't shout to alert her brothers. The reason she gave was that her mouth was covered by the accused. She did not explain how the accused was able to close her mouth with one hand and undress himself with the other and in which position he was when he penetrated her vagina with his penis.
41. It is quite understandable that the complainant did not tell her brothers because they were still young. When the parents returned home, the complainant was asleep. She did not however complain to her mother the following morning and not until the complainant was confronted by her mother on 21 August 2019. Her explanation was that she feared that the accused would change his story and say, as he had warned, that it was she who had initiated the affair. The complainant agreed that her mother was not a very strict person. They were

on talking terms and had maintained a good relationship. Her mother got angry when she finally learnt of the matter not because of what the accused had done to her daughter, but rather because of her daughter's failure to tell her anything until the matter was relayed to her by an outsider.

42. Is the explanation given by the complainant for the delayed complaint tenable in the circumstances of this case and acceptable to the Court? Before answering this question, it is apposite to scrutinize the circumstances under which the matter finally came to light.
43. As I said before, the complainant had never complained to anybody until she was confronted by her mother on 21 August 2019. The complaint eventually made by the complainant to her mother does not satisfy the tests applicable to admit recent complaint evidence in the context of sexual offences. Firstly, the so-called complaint cannot be considered 'recent' in the circumstances of this case, specifically in the absence of an acceptable explanation for the delay, as it was made almost a month after the alleged rape. Secondly, it was not spontaneous. She relayed the incidents only when she was grilled by her mother based on information already she had received from another source. The complainant at the first instance in fact refused to divulge the full details of the complaint.
44. It is interesting to note that the basis of the information that had finally reached the complainant's mother itself was a conduct of a similar nature, albeit uncharged, involving the accused and the complainant. Although Litiana was not in court to give evidence, it was not disputed that Litiana saw the accused hugging the complainant in a room on 6 July 2019. That was the very next day after the first alleged incident on 5 July 2019. Litiana had relayed what she saw on 6 July 2019 to her mother Buna who in turn had passed the same information to Adi Lasona, the mother of the complainant, sometime in August 2019.
45. Both the complainant and the accused testified to the hugging incident that took place on 6 July 2019. On that day, the complainant had gone inside the accused's room because the accused was calling her to his room. The complainant agreed that if anything happened on the 5th as alleged, she would not have gone inside the accused's room again. Then why did

she take a risk and went to the accused's room despite knowing that the accused's conduct on the previous day was not appropriate and not to her liking?

46. The complainant's friend Litiana saw the accused pulling and hugging her when Litiana entered the room. The complainant knew that Litiana saw her being hugged by the accused. Still, the complainant did not complain about this incident to her mother or Litiana. She kept it a top secret until the information was conveyed to Buna by her daughter, Litiana. The complainant said that she never expected Litiana to reveal what she saw on the 6th to her mother and that is why she was not scared of the accused's warning that he would change the story and tell everyone that it was she (the complainant) who initiated the affair.
47. When the complainant's mother Adi Losana received information from Buna, the complainant was questioned by her mother. The complainant first denied having had sex with the accused and agreed only when her mother kept confronting her. Adi Losana was angry that her daughter did not tell her straight after what the accused had done to her.
48. The way the alleged incident finally came to light does not allow me to accept the complaint eventually made by the complainant to her mother was true. It is open for the Court to believe that the complainant made up a story to cover up her own wrongdoing by blaming the accused.
49. I observed the demeanour of the complainant carefully. She was not straightforward. She was not consistent in her answers and the manner of giving evidence. She appeared to hide something.
50. The accused maintained that he was in a secret intimate relationship with the complainant, and everything was done with the consent of the complainant. He does not deny that the complainant pushed him on the 5th and 12th. But he knew that the complainant was pushing him not because she was not consenting to his acts but because she feared that her mother (on the 5th) and her brothers (on the 12th) may be alerted. According to the accused, the

complainant had in fact conveyed her sentiments to that effect when she said - *be careful the kids might enter the room and see them.*

51. The learned State Counsel argued that this position of the accused was never put to the complainant when she took the witness stand. I do not expect the accused to give instructions in every detail to his counsel during the consultations. The mere failure on the part of the Defence Counsel to put the accused's position to the complainant does not suggest that the accused was untruthful.
52. Even if the complainant had not conveyed her sentiments in words, the conduct of the complainant which I described earlier allowed the accused to believe that the complainant was consenting to his actions. Even if the accused did not know whether she was consenting, it is sufficient if he believed or was not reckless in engaging in the alleged sexual conduct in the circumstances known to him. The accused has not taken an unreasonable risk in the circumstances known to him.
53. The evidence led in this trial leaves me in doubt whether the complainant was not consenting to the sexual acts of the accused. The benefit of the doubt must be given to the accused. I accept the version of the Defence and reject the version of events of the Prosecution case.
54. The Prosecution failed to prove the charges beyond a reasonable doubt. I find the accused not guilty on each count. The accused is acquitted on all counts and discharged accordingly.



Aruna Aluthge

Judge

At Lautoka

On 29 September 2023

Counsel: Office of the Director of Public Prosecution for State
Legal Aid Commission for Defence

