

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 266 OF 2021**

**BETWEEN**

**STATE**

**AND**

**DANIEL VIKASH**

**Counsel**

Ms K Semisi with Ms T Kumar for the State

Mr J Rabuku with Mr L Cati for the Accused

**Date of Hearing**

**1 May 2023 – 4 May 2023**

**Date of Judgment**

**29 September 2023**

**JUDGMENT**

[1] **Charge**

The accused is charged with digital rape contrary to section 207(1) & 2(a) of the Crimes Act.

[2] **Burden and Standard of Proof**

The burden is on the prosecution to prove the charge beyond a reasonable doubt. Each element of the charge must be proved but not every fact of the story.

[3] The accused chose to give evidence but he does not carry any burden to prove or disprove anything. The burden remains on the prosecution to prove his guilt beyond a reasonable doubt.

[4] **Elements**

Digital rape occurs when a person penetrates the vagina of another 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.

[5] The prosecution must prove the following elements beyond a reasonable doubt:

1. That on the alleged date and place the accused penetrated the vagina of the complainant with his fingers.
2. That the complainant did not freely and voluntarily consent to the sexual penetration.
3. That the accused knew that the complainant was not consenting.

[6] Slight penetration is sufficient to amount to rape.

[7] The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent or the absence of consent can be communicated by the words or acts of the complainant.

[8] The knowledge of the accused that the complainant did not consent is a matter for inference from all the proven facts.

[9] **Evidence led by the Prosecution**

The prosecution led evidence from five witnesses. It is not necessary to recite the evidence verbatim. I will summarize the salient features.

- [10] The complainant is an adult woman in her late twenties. At the time of the alleged incident she was married and worked as a security officer for a private company.
- [11] The date of the alleged incident is 17 May 2021. It was a time when the Covid-19 lockdown measures were in force. On this day, the complainant was rostered for duty at Vinod Patel Building carpark, Laucala Bay. Her shift was for 12 hours from 7 am to 7 pm. She had one other male colleague with her who finished around 6 pm.
- [12] After the male colleague left, two night shift security officers by the name Luke and Viliame came to take over. At around 6.45pm the complainant went to relieve herself before finishing her shift and returning home. She went into a toilet that was designated for males. She explained that she went into the male's toilet because she did not have the keys to the female's toilet which was locked during the Covid time. She said that during Covid measures she was told to use the male toilet by her own supervisor and the Vinod Patel Building supervisor in a meeting in which she was present.
- [13] When she entered the washroom nobody was inside. The toilet was inside an enclosed cubicle with a door. As soon as she entered the washroom she went inside the toilet. She closed the toilet door. The toilet door could not be locked at the time. The washroom and the toilet area was well lit. The lights were on. She was wearing a blue colour shirt with an orange reflector and a black colour long pants.
- [14] While the complainant was inside the toilet she heard the noise of opening of the washroom door. Suddenly someone pushed her toilet door. She tried to stop the door from opening using her hand but when she was unable to hold on she let it go. At the time she was relieving herself and her pants was down to her knees. She tried to hold her pants with one hand.

- [15] A male person entered the toilet and at the same time he closed her mouth. She pushed him away and ran out of the toilet into the washroom area where the vanity was. The male person pursued her. He kissed her on the mouth and neck and placed his hand inside her breast. At that moment her shirt buttons burst open. He squeezed her breast and when she let her pants go while struggling he inserted his two fingers inside her vagina, pulled it out and inserted it again. She did not consent.
- [16] When she told him that she was going to report him, he responded saying he wanted to make her his girlfriend. She told him she was not interested. He pushed her towards the wall and snatched her phone when she was wanted to make a call. She shouted for help but nobody could hear her.
- [17] The complainant recognized the accused. She had him under observation for about 10 minutes inside the washroom. She had seen him two or three times previously at the Vinod Patel carpark. He was the driver who picked and dropped Pac Leader staff during Covid and drove a red colour vehicle. Pac Leader was a business that was operating from Vinod Patel Premises.
- [18] The complainant's evidence is that the accused gargled his mouth with water, washed his hands and went out of the washroom. After the accused left the washroom the complainant filled an empty bottle with water which she took out from the rubbish bin, went into the toilet and washed her bottom. After that she returned to the vanity and washed her face and then went out holding her shirt together because her buttons were torn when the accused forcefully placed his hand inside her shirt.
- [19] The complainant went straight to her work colleagues, Luke and Viliame and informed them what the accused did to her inside the washroom. They started

laughing and advised her to report to police. She did not know the name of the accused but when she learnt from her colleagues that the accused's vehicle was still at the carpark she went and confronted him and asked him for his name. At the time the accused was with another male and both pointed out to each other when the complainant asked the accused for his name.

[20] The complainant then yelled at the accused and went to the Police Headquarters Office that was located at Vinod Patel premises.

[21] SC Rakaci attended to the complainant. He received a report from the complainant that she was raped in the male's toilet situated at Level 2. At around 7.20 pm the officer accompanied the complainant to the carpark and she pointed to the accused as the person who did things to her inside the washroom. The officer asked the accused to verify his identity and then escorted him to Valelevu Police Station for questioning.

[22] The complainant came to know that the accused's name was Daniel Vikash when the police officer asked for his ID. The complainant then accompanied the police officer to Valelevu for recording of her statement and for medical examination.

[23] Viliame Tubailagi's evidence is that on 17 May 2021 he reported for night shift security duty at Vinod Patel carpark at around 6.30 pm. At the time the complainant was about to finish her shift. Viliame was sitting down with another male colleague near the payment booth at the carpark when the complainant came screaming that somebody had raped her. She referred to the person who raped her as Pac Leader's driver. Viliame told the complainant to go and report the incident to the Police Headquarters.

[24] WDC Claire gave evidence to explain why she referred the accused as a Fijian in the complainant's statement that she recorded as part of police investigation. Her evidence is that the complainant told her that the accused was of Indian decent but when the officer wrote the statement she wrote the accused was a Fijian because that is how they have been trained to record statements as a matter of policy when making reference to race of the suspect.

[25] On the same day the complainant was examined at the CWM hospital by Dr Sulueti Balenacagi. Upon physical examination of the complainant the doctor noted a small 2x1 cm tenderness on the pubic area. The complainant complained of extreme vaginal pain but there were no redness, bruising or bleeding on the vaginal wall.

[26] That is a summary of the prosecution evidence.

[27] **Defence Case**

The accused's evidence is that he has a transport business and owns two vehicles. During Covid he was hired by a company called Pac Leader to pick and drop their staff from their work to their homes. He admits he owns a red colour vehicle. He said that he is diabetic and that is why he has to frequently visit toilet. While working for Pac Leader he had visited the male's toilet at Vinod Patel Building on several occasions.

[28] On 17 May 2021, the accused came to the Vinod Patel carpark at around 4.45 pm and at around 5.40 pm he went to the male's toilet. When he opened the washroom door he saw the complainant near the vanity combing her hair. He said that he had not seen the complainant before. She was wearing her uniform. He asked her what she was doing in the male's washroom and if she was done he wanted to use the washroom. She came out and then he went and used the washroom. After using

the urinal he washed his hands and returned to his vehicle that was parked at the carpark. He said another driver by the name Shom whom he had hired during Covid was with him on that day. He was talking with Shom at an area designated for smoking at the carpark when the complainant came and had a casual conversation with him. After the conversation she went somewhere.

[29] At around 6 pm the accused went to drop some people when Shom called him and told him the police were looking for him. He returned to the carpark and saw the complainant was with a police officer. The accused was taken into custody after the complainant pointed him out to the police officer.

[30] In cross examination the accused accepted that in his caution interview it is stated that he went to the toilet at 6.45 pm but he explained that he gave the time 5.40 pm but the interviewing officer did not record the correct time.

[31] Apart from the accused, the defence called four witnesses.

[32] Shom Kumar gave evidence that on 17 May 2021 the accused came to the carpark for the afternoon drop off at around 4.30-5 pm and went straight to the washroom. After sometime he saw the accused and a girl in security uniform came out of the washroom and walked straight to the smoking area where he was. He saw the accused and the girl talking but he didn't bother what they were talking about. After about 10 minutes he and the accused started their drop off runs. After doing his run Shom returned to the carpark first. When the accused returned a police officer came and spoke to him and Shom was also called to give a statement. In cross-examination Shom accepted that he might have got the time wrong when he saw the accused going into the washroom that afternoon.

[33] Ashneet Kumar is the complainant's current HR Manager who said he never had any conversation with the complainant regarding her losing her employment due to her court matter.

[34] Aborosio Qeretabua is an employee of Pac Leader Pacific. As an employee of Pac Leader he used the male's toilet where the alleged incident took place. He said that the toilet always had a lock and you can lock the door from inside.

[35] Vijay Prakash is the managing director of the security company that employed the complainant in May 2021. His evidence is that there had never been any meeting with the Vinod Patel properties' Manager attended by the complainant in which they had discussed the use of the men's and the women's toilet at the Vinod Patel building.

[36] That is a summary of the defence case.

[37] **Analysis**

I approach the evidence dispassionately, without sympathy or value-laden rules regarding how boys and girls should conduct themselves. It is entirely a matter for me to decide which witnesses are credible and reliable and which part of their evidence I accept as true.

[38] If the account given by the accused 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.

[39] The prosecution's case is substantially dependent upon the complainant's evidence. She is an adult witness. Her evidence does not require corroboration. If



her account of the alleged incident is true, then the accused is guilty of the charge. However, if her account is false or may be false then the accused is not guilty.

- [40] To put matters into context the prosecution led evidence of uncharged acts of the accused kissing the complainant and fondling her breasts before or during the offence charged.
- [41] The uncharged acts are relied upon by the prosecution to make the circumstances of the particular offence charged more intelligible. The uncharged acts are not relied upon to establish a tendency on the part of the accused to commit offence of the type charged, and therefore, the uncharged acts cannot be used as an element in the chain of proof of the offence charged. The only use I make of the uncharged acts if I accept it to be true is to place the charged act into a realistic context.
- [42] The defence case is of denial. The defence submits that the allegation of rape is a fabrication. The accused did not penetrate the complainant's vagina with his fingers as alleged by her.
- [43] I do not give any weight to the accused's evidence. His evidence is not logical and consistent. He says he asked the complainant what she was doing in the male's toilet. After a brief conversation she came out of the washroom. He then used the toilet and returned to the carpark. She then came and had a casual conversation with him and then left. After he returned from a drop off run the complainant accused him of rape.
- [44] Shom's evidence is also not logical and consistent. He is a friend of the accused. The accused's version is that the complainant left the washroom first and when he came out and was chatting with Shom at the smoking zone the complainant came

and spoke to him. Shom's version is that he saw both the accused and the complainant come out of the washroom together and then joined him at the smoking zone and conversed.

- [45] Ashneet's evidence is irrelevant and has no probative value.
- [46] Aborosio's evidence has little probative value. Whether or not the toilet had locks at the time of the alleged incident is not a material issue.
- [47] Vijay's evidence is also of little probative value. The reasons why the complainant used the male's toilet on 17 May 2021 is not a material issue.
- [48] The material issue in this case is whether the accused penetrated the complainant's vagina with his fingers as alleged by her? The exact time of the alleged incident is not material. If I believe the complainant's evidence on penetration then it also proven that she did not consent and her resistance during the alleged incident proves that the accused knew she was not consenting.
- [49] When the complainant walked out of the washroom she was hysterical and cried out rape according to Viliame. She reported to Viliame of what had happened to her inside the washroom. It does not matter whether Viliame believed her or not. She implicated the accused and confronted him when he was with Shom at the carpark to ascertain his name. She then immediately reported to a police officer. She maintained that position when her statement was recorded and when she was medically examined. According to the doctor the complainant told her she was feeling extreme pain in her vagina. It does not matter that the doctor did not find any injuries in the complainant's vagina. The explanation for lack of injuries is reasonable. The complainant was an adult married woman.

[50] The complaint made to Viliame and the police officer is not corroborative of the complainant's account but it shows consistency on behalf of the complainant.

[51] The complainant may not have been able to express herself clearly when giving evidence but she struck me as an honest and reliable witness. She was subjected to a lengthy cross examination. Any inconsistency in her evidence was only peripheral and did not affect the veracity of her evidence. I believe her when she said that the accused penetrated her vagina with his fingers despite her resistance inside the male's toilet at Vinod Patel premises when she working as a security officer on 17 May 2021.

[52] **Verdict**

I feel sure of the accused's guilt. The accused is convicted of rape as charged.



A handwritten signature in black ink, appearing to read "Daniel Goundar".

**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State

Rabuku Lawyers for the Accused