

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 284 OF 2021**

**BETWEEN**

**STATE**

**JARROD RAIKANIKODA**

**Counsel**

Ms W Elo for the State

Mr N Chand and Mr P Sharma for the Accused

**Date of Hearing**

**25 July 2023**

**Date of Judgment**

**27 October 2023**

**JUDGMENT**

[1] **Charges**

The accused is charged with one count of rape contrary to section 207 (1) (2) (a) of the Crimes Act (count one) and two counts of sexual assault contrary to section 210 (1) (a) of the Crimes Act (counts two and three).

[2] Counts one and two are founded on the same facts. The charges allege that the accused on 28 October 2021 at Suva had carnal knowledge of the complainant, without her consent and also unlawfully and indecently assaulted her by sucking her breasts and licking her neck.

[3] Count three alleges that the accused either on 13 or 14 November 2021 at Suva unlawfully and indecently assaulted the complainant by caressing her thighs and sucking her neck and shoulder.

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

The burden is on the prosecution to prove each charge beyond a reasonable doubt.

[5] 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.

[6] **Elements of Rape and Sexual Assault**

To prove the offence of rape as alleged on count one, the prosecution must prove the following elements beyond a reasonable doubt:

1. On the date and place alleged, the accused had sexual intercourse with the complainant, that is, he penetrated the vagina of the complainant with his penis.
2. The complainant did not consent to penetration of her vagina.
3. The accused knew that the complainant was not consenting.

[7] Slight penetration is sufficient to amount to rape. It is not necessary to prove that the accused ejaculated.

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

[9] To prove the offence of sexual assault as alleged on counts two and three, the prosecution must prove the following elements beyond a reasonable doubt:

1. On the date and place alleged, the accused assaulted the complainant.
2. The assault was unlawful and indecent.
3. The assault was without the consent of complainant.
4. The accused knew that the complainant was not consenting.

[10] An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused the complainant fear or pain. There is no suggestion in the present case that, if the accused touched the complainant as the prosecution alleged he did, the touching was lawful.

[11] The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant's body or uses it in a way which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.

[12] **Admitted Facts**

The identity of the complainant and the accused is not an issue. The complainant was born on 9 July 2003. In 2021, she lived with her parents at Lot 1, Lagakali Road, Kalabu Housing.

[13] The accused was born on 16 February 2003. In 2021, he lived with his parents at Lot 5 Lagakali Road, Kalabu Housing.

[14] The accused and the complainant were neighbours and knew each other. Both were 18 years old in 2021. The accused has a brother known as Jerry.

- [15] It is not in dispute that on 28 October 2021 the accused penetrated the vagina of the complainant with his penis.
- [16] It is not in dispute that either on 13 November 2021 or 14 November 2021 the accused went and called the complainant and they had a conversation outside of the complainant's house.
- [17] It is not in dispute that on 16 November 2021 the complainant was medically examined at CWM Hospital.
- [18] **Prosecution Case**
- The prosecution's case is wholly depended on the complainant's evidence.
- [19] The complainant's evidence is that on 28 October 2021, she went to the accused's house when the accused's brother called her to join them for a smoke. She sat at the front porch with the accused, his brother and some other friends. After a while the accused's brother and his friends went to the back of the house to smoke while the complainant and the accused remained at the porch. After 2-3 minutes the complainant got up to join the boys at the back of the house for a smoke. She was going to go through the front door and exit through the back door. When she entered the house the accused followed her. He pushed her into one of the bedrooms and closed the door. She tried to call out to the accused's brother. After 2-3 minutes the accused entered the room. He started touching her and then he said in iTaukei 'just a quick one'. He started licking her neck and sucking her breast. She couldn't move. She was shocked because both knew she had a boyfriend who was also the accused's friend. He pushed her on the bed and took off her pants. She couldn't move. He then put his penis inside her vagina for about 1-2 minutes. She felt pain and weak. She couldn't look at him when he was doing that because he was someone she saw as a friend and she was embarrassed. When

she stood up to put on her pants he went and got her a cup of water. When she was dressing up the accused's brother walked inside the room. She went straight to her home and washed herself. Her grandmother and her brother were at home. She did not have the courage to tell anyone.

[20] In relating to the incident on 14 November 2021, at around 3 am or 4 am, the complainant said that she was asleep when her brother woke her up and informed her that the accused was outside at the back door and asking for the money that she had borrowed from him. She got up and went outside to ask him what he wanted. She went and told him to stop lying about her borrowing money from him. He responded saying it wasn't the money but the same thing meaning 'just one fast one'. She said no and reminded him what he did on 28 October. He persisted and grabbed her hand to go to the back of an old house next to her house. She fanned off his hand and ran to the front but he followed her. He came and sat next to her on the chairs. He was very drunk. He wanted to have sex. She didn't want to do it again because she might regret it later. He started touching her. He touched her thighs and started licking her left shoulder. She felt disgusted. She stood up and went straight inside the house through the back door. The accused tried to follow her inside the house but when he saw her brother he went away. She reported the incidents after her mother overheard a conversation and confronted her.

[21] That is a summary of the complainant's evidence.

[22] **Defence Case**

The accused in his evidence admits to sexual intercourse with the complainant on 28 October 2021. He said that when his brother and friends left for a smoke at the back of their house, he asked the complainant for sex and she said yes. They went inside a room in his house and she pulled down her jeans and panty. He then pulled down his pants and underwear and had sexual intercourse with her. After having

sexual intercourse he went out and got her a cup of water and that is when his brother came inside the room.

[23] The accused admits going to the complainant's house on 13 or 14 November 2021 but he denies caressing her thighs or licking her shoulder area.

[24] **Analysis**

The identity of the accused is not an issue in this case. He admits to sexual intercourse with the complainant on 28 October 2021. His account is that the complainant consented.

[25] On counts one and two, the issues for determination are whether or not the complainant consented to sexual intercourse and sucking of her breast and licking of her neck and whether or not the accused knew she was not consenting.

[26] If the account of the accused is true or may be true, then he is not guilty of the charges. But even if I find his account to be false that does not mean that he is guilty of the charges. His guilt must be established by the prosecution.

[27] The complainant's account is that on 28 October 2021 she voluntarily went to the accused's house for a smoke. When others left to the back of the house to smoke she remained with the accused on the front porch. Her explanation for going inside the house is that she wanted to join the rest of the boys who were smoking at the back of the house. When she walked in, the accused pushed her inside a room and closed the door. She did not say that the door was locked and that she could not open it to escape. The accused then came inside and raped her. She did not resist because she was shocked. She did not complain to anyone because she did not have the courage to do so.

- [28] The law does not require her evidence to be corroborated for her to be believed. Nor is it necessary for her to resist or complain to show that she was not consenting. However, there are certain aspects of her evidence that leads me to conclude that she may have consented to sex on 28 October 2021. She was 18 years old and same age as the accused. Both were neighbours and knew each other well.
- [29] There is no plausible explanation for her non-resistance to what was being done to her by the accused against her will on 28 October 2021. She knew her friends were at a close proximity. She said she was shocked but she did not say no to the accused. Further, she did not provide any explanation as to how the accused was able to forcefully undress her without her cooperation.
- [30] She confirms that after the accused had sexual intercourse he left and got her a cup of water. While she was dressing up the accused's brother walked into the room. She must have realized that the accused's brother had come to know that she and the accused had sex in the room. She had a boyfriend who was also a close friend of the accused. She regretted and her evidence is that when the accused turned up at her doorsteps in the early hours of 14 November 2021 drunk and asked her for sex, she expressly said no. She explained that she didn't want to do it again because she might regret it later.
- [31] I am not sure whether the sexual acts between the accused and the complainant on 28 October 2021 were without her consent, but I am sure that caressing of her thighs and licking of her shoulder by the accused on 14 November 2021 was without her consent, and the accused knew she was not consenting. The act was indecent and without any lawful excuse.
- [32] On counts one and two, the prosecution has failed to establish the accused's guilt beyond a reasonable doubt.

[33] On count three, the prosecution has established the accused's guilt beyond a reasonable doubt.

[34] **Verdict**

The verdict of the court is:

Count one – rape – not guilty – acquitted.

Count two – sexual assault – not guilty – acquitted.

Count three – sexual assault – guilty – convicted.



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

**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State

Raikanikoda & Associates for the Accused