

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 100/2022

STATE

V

ELVIN NAND

COUNSELS:

<i>Ms. Bibi and Ms. Kumar P.</i>	-	<i>for Prosecution/FICAC</i>
<i>Mr. Emasi I</i>	-	<i>for Accused</i>

Date of Hearing: 27.11.23 – 01.12.23

Date of Judgment: 27.01.24

JUDGMENT

1. The accused in this matter, **ELVIN NAND**, was charged with one count of **Rape** and one count of **Sexual Assault** against SUPRIYA CHAND, as below:

COUNT 1

Statement of Offence

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

Particulars of Offence

ELVIN EVIN NAND on a date between the 1st day of July 2021 and the 31st day of July 2021 at Nanuku Settlement, Vatuwaqa in the Central Division, penetrated the vagina of SUPRIYA CHAND with his fingers, without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

ELVIN EVIN NAND on a date between the 1st day of July 2021 and the 31st day of July 2021 at Nanuku Settlement, Vatuwaqa in the Central Division, on an occasion other than in Count 1, at Nanuku Settlement, Vatuwaqa in the Central Division,

unlawfully and indecently assaulted **SUPRIYA CHAND** by squeezing her breasts and kissing her lips.

2. Upon reading of the charges in Court on 27/04/2022, **ELVIN NAND** understood and pleaded not guilty to the charges filed against him. At the trial, the Prosecution led the evidence of 2 witnesses, including the evidence of the victim, **Suriya Chand**. At the end of the Prosecution case, since the Court was convinced of the availability of a prima facie case for the Prosecution, acting under **Section 231** of the **Criminal Procedure Act of 2009**, Defense was called from the Accused and all the available options were explained to the Accused.
3. At this juncture, the Accused opted to give evidence subject to cross-examination and one more witness was called for the Defense. At the end of the Défense case, the Court heard oral submissions from Counsel representing the Prosecution and the Defense. Having carefully considered the evidence presented at the trial, this Court now proceed to pronounce the judgment in this matter, as below:

Element of the offence of Rape

4. The main elements of the offence of Rape under **Sections 207(1) and (2) (b)** of the **Crime Act 2009** applicable to this matter are:
 - i) The Accused;
 - ii) Penetrated the vagina of the Complainants with his fingers;
 - iii) The Complainant did not consent the Accused to penetrate the vagina with his fingers;
 - iv) The Accused knew or believed or was reckless that the Complainant was not consenting for him to insert his finger in that manner.

Elements of the Offence of Sexual Assault

5. The main elements of the offence of Sexual Assault applicable under **Sections 210(1) (a)** of the **Crime Act 2009** relevant to this matter are:
 - i) The Accused;
 - ii) Unlawfully and indecently assaulted the Complainant.

Burden of Proof

6. The Accused is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The prosecution must prove the Accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the Court was not sure of the guilt of the Accused, or if there be any hesitation on the part of this Court of the establishment of the ingredients or on the evidence led by the Prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has given evidence in this case. Thus, if this court

accepts the defence evidence or is unable to reject or accept the defence evidence, then too the Accused is entitled to a finding in his favour.

Prosecution Case

7. The first witness for the Prosecution (**PW1**) was **Supriya Chand**, the victim in this matter. She testified that she is 18 years old and marked her birth certificate as **PEX1**. She claimed that she lives in Vatuwaqa with her brother and maternal grandfather. She claimed that she reported to the police about Elvin, but she now wants to reconcile and forgive for everything that happened. As result, she insisted she doesn't want to tell Court what Elvin did to her. At this juncture, on the request of the Prosecution, by acting under **Section 118 (1)** of the **Criminal Procedure Act 2009** Court committed the victim to prison for 3 days.
8. Being produced from the prison on 01/12/203 to testify, victim **Supriya Chand** Informed Court that she was reluctant testify the previous day, since Elvin's brother came to her home and told her that if she tells the truth against Elvin in Court, he will drink harmful medicine. Thereafter, she claimed that she shared the story with her friend **Betty** and they decided to go to the police. Referring to her grievance, she mentioned that when she was lying on the bed watching a movie in July 2021, Elvin came and sat beside her and kissed her on her lips. According to her she had pushed the Accused then, since she didn't want him to do anything to her, but she had realized that she was physically weak to overpower the Accused. Thereafter, the Accused had lied down beside her and put his hand into her private part, which is her vagina. She emphasized that the Accused inserted his fingers inside her vagina. She further clarified, at that time, she was wearing pants with a panty and the Accused inserted his fingers by putting his hand inside the cloths by force and told her not to tell anyone and put his hand on her mouth. She alluded that when the Accused inserted his finger, she felt something going inside her body, where the Accused pulled his finger out and inserted again for a short time. At that juncture, since her brother came to the house the Accused had gone away.
9. She further testified that it was getting dark at that time when this incident took place, but there was light in the sitting room that brought light to her room and facilitated her to see the Accused well. She claimed that her maternal grandfather was also in another room in the house, but she can't recall whether her mother was in the house or not. According to her, the next day when her friend **Betty** came to her house, she had told her that Elwin forcefully kissed her, but she had been embarrassed to tell that the Accused put his finger to her vagina. Though **Betty** told her to report, she had not done so, since she feared the Accused, and all this happened without her consent. She further claimed that such incidents have happened with Elvin 2, 3 times, where on one occasion the Accused put his hands on her chest, subsequent to the incident of him putting his fingers to her vagina. On that occasion the Accused had touched her inside of her cloths and squeezed her chest with his hand. To explain the incident, witness marked the chest the Accused squeezed in **PEX3** and claimed that it happened in her room. She confirmed that she complained this to the police about one month after the incident of the Accused putting his hand to her vagina.
10. The second witness for the Prosecution (**PW2**) was **Betty Tavo**, the friend of the victim. She claimed that she is 20 years old, and she has known PW1 for a long time. She alluded that when she visited Supriya at her home, Supriya told her that Elwin kissed her and rubbed her breasts and she was scared that no one will believe her if she complains, where she had told her to complain. She confirmed that in the same year, she went to the police with Supriya to complain.

Evaluation of the Prosecution Case

11. In this matter, for the Prosecution case, the main witness that testified to establish the case against the Accused was the Prosecutrix (**PW1**) **Supriya Chand**. However, when testifying in Court, she was reluctant to give evidence and informed Court that she doesn't want to tell the Court what the Accused did to her, and she wants to reconcile and forgive the Accused. Thereafter, on being remanded by Court under **Section 118** of the **Criminal Procedure Act of 2009** for being an uncooperative witness, this witness informed the Court the acts that were done to her by the Accused, which she complained to the police about. Further, this Court noticed of the family interference she mentioned, where the brother of the Accused had threatened to drink poison, if she tells the truth in Court. In recognizing the initial reluctance shown by the Prosecutrix to give evidence against the Accused, this Court intends to refer to the observations of the **Wellington Court of Appeal of New Zealand** in the case of **R v H [1997]**ⁱ, where it stated, as below:

“It is now widely acknowledged that the forces which cause a woman to hesitate before complaining are particularly powerful when the rape has occurred in a family situation, or the rapist is not a stranger. In such situations the pressure on the woman is acute. She may worry about destroying the family relationship, she may fear the reaction of her husband to the knowledge that she has been raped by another man, she may be confronted with hostility from other family members, she may fear that, because of the nexus between her and the rapist she will be disbelieved, she may be concerned that her own actions or behavior prior to the rape, less inhibited because of the family relationship or acquaintanceship with the rapist, will be construed as provocative, or she may suffer in an attenuated form any of the other forces which cause women to suppress an inclination to talk about their ordeal.”

12. This Court perceives that the above detailed situation faced by females in complaining against a family member committing rape is further aggravated in this matter considering the young age of the victim and the absence of a responsible adult living with her for her to have the confidence and security to complain against her cousin.
13. Testifying in Court the second day of the trial, she narrated the occurrence of events in this matter to the best of her ability at her own pace. She was prompt in her responses and did not try to evade from questions. Furthermore, she informed how the Accused attempted to warn her not to complain, since he had been successful in legal challenges against him. This Court observed the demeanor and deportment of this witness in Court and was impressed with her testimony and this Court has no reason to disbelieve the narrated trajectory of events by her. In cross-examination, Defense failed to challenge the evidence narrated by her in Court.
14. The second witness for the prosecution corroborated in Court how (**PW1**) informed her of the physical harassment she faced from the accused.

Defense Case

15. Testifying in Court the Accused alluded that in 07/2021 he was living in Nanuku settlement with my uncle, where his house was about 20 houses away from Supriya's (PW1)'s house and at that time Supriya, her brother and his maternal grandfather's brother lived there. He admitted that in July 2021 he visited that house twice, because people living in that house called him and asked him to bring meet for their consumption. According to him, the first time he had visited in that month on them calling, where he had taken some food. The second time he had gone to mix grog. First time it had been in the morning at around 8 am and when he went there Supriya had been standing outside the house and he had given food without going inside the house and come off in 10 minutes. However, at that instance he had got angry with Supriya, since she was wearing shoes inside the house and washing her under garments near the place where people consume food in that house. On the second time he had gone there and mixed grog. He claimed that the two trips were about a week and 4 days apart. He identified Photo 2 of **PEX2** as the porch of Supriya's house and emphasized that he didn't go beyond the porch the first time. On the second occasion also, he had greeted Supriya at her house. He affirmed that when he was locked at the police station, Supriya came to the police station and said that she wants to withdraw the case and that in 07/2021 none of the things alleged happened.
16. The second witness for the Defense (DW2) was Shahil Chand, the brother of the victim. In giving evidence he mentioned that he resides in Nanuku settlement and in 07/2021 his sister and grandfather were residing with him. He recognized the Accused in Court as his cousin. He claimed that in 07/2021 the Accused visited his house to give food to his grandfather and stayed in his porch, where on that month the Accused came another time to his house to make grog. In facing cross examination, he mentioned that someone has taught his sister to frame the Accused and he will always be there to save the Accused, if needed. Furthermore, he alluded that on both occasions the Accused came home in July 2021 his sister was not at home but in Nabua. He also affirmed that before July 2021 the Accused did not visit their house often.

Evaluation of Defense Evidence

17. By the testimony of the Accused he claimed that he reproached the victim since he saw her washing under garments at the place people consume food in the victim's house and since the victim was wearing shoes in the house. Nevertheless, he mentioned that he only went twice to the house of the victim that month. In this light, in considering the remote connection of the Accused to the residence of the victim, one could reasonably question what right the Accused has to question the victim about her conduct, when he rarely visits this house. This position was further compounded with the evidence of **DW2**, when he mentioned that the accused rarely comes to his house. With the evidence of the Accused, he accepted that he visited victim's house in July/2021, where the victim was living with a physically weak grandfather, but the Accused had not bothered to check the presence of his trustworthy cousin, Shahil.
18. Giving evidence (DW2) Shahil affirmed that the Accused is his good friend, and he will always be there to save the Accused. In the same vein of sentiments, this witness informed Court that on the two days in July 2021 when the Accused visited his house his sister Supriya was not at home and she was in Nabua, though the Accused mentioned that on both days he greeted Supriya at home. Considering these questionable infirmities in the Defense evidence, this Court does not consider it safe to accept the Defense evidence and reject the evidence in toto.

Finding of Court

19. Considering the elements that needs to be established in relation to **Rape** for the count 1, firstly there is no doubt in relation to the identity of the Accused by **Supriya Chand (PW1)**, as they were cousins living in the same neighborhood. As per the second and third elements, **(PW1)** has testified in this Court that the Accused put his hand to her private part, i.e. her vagina by force, establishing the ingredients of these two elements. In relation to the 4th element, the fact of the victim resisting to the conduct of the Accused should have indicated to him that **Supriya** was not consenting to his conduct, which he knowingly or recklessly disregarded. In this sense, all the required elements to establish the offense of **Rape** have been established by the Prosecution in this matter through the evidence of **Supriya Chand** beyond reasonable doubt.
20. In relation to count 2 of **Sexual Assault**, the 1st element is not in any doubt. With regard to the 2nd and the 3rd elements, with the testimony of **(PW1)** in Court the Prosecution has proved these two elements, thus establishing all the elements required for **Sexual Assault** beyond reasonable doubt.

Conclusion

21. This Court finds the Accused **ELVIN NAND guilty** in relation to the one count of **Rape** and one count of **Sexual Assault** he is charged with in this matter. Therefore, the Accused is hereby convicted for committing the offences of **Rape** contrary to **Section 207 (1) and (2) (a)** of the **Crimes Act 2009** and for committing the offense of **Sexual Assault** under **Section 210 (1)(b)(ii)** of the **Crimes Act of 2009**.
22. You have 30 days to appeal to the Fiji Court of Appeal.



A handwritten signature in blue ink, appearing to read "Thushara Kumarage".

Hon. Justice Dr. Thushara Kumarage

At Suva

This 26th day of January 2024

cc: *Office of Director of Public Prosecutions*
Legal Aid Commission

¹ [1997] 1NZLR 673