

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CRIMINAL JURISDICTION**

**Criminal Case No. HAC 83 of 2024**

**STATE**

**-v-**

**SUSHIL CHAND KUMAR**

**Counsel : Mr. T. Tuenuku for the State**  
**Mr. R. Dayal for the Accused**

**Date of Trial: 3 – 4 April 2025**

**Date of Judgment: 9 May 2025**

**JUDGMENT**

1. Mr. Sushil Chand Kumar (“the accused”) is charged with the following two counts of Rape:

**INFORMATION BY THE**  
**DIRECTOR OF PUBLIC PROSECUTIONS**

**SUSHIL CHAND KUMAR** is charged with the following offences:

**COUNT 1**

**Statement of Offence**

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

**Particulars of Offence**

**SUSHIL CHAND KUMAR** on the 14<sup>th</sup> day of July, 2024 at Labasa in the Northern Division, inserted his penis into the mouth of **PREETIKA SHYMILA RAJ** without her consent.

**COUNT 2**

**Statement of Offence**

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

**SUSHIL CHAND KUMAR** on the 14th day of July, 2024, at Labasa in the Northern Division, on the same occasion as count 1 above, inserted his penis into the vagina of **PREETIKA SHYMILA RAJ** without her consent.

**Elements**

**Count 1**

2. To establish count 1 the prosecution must prove beyond reasonable doubt:
  - (i) That the accused penetrated the complainant's mouth with his penis. The slightest penetration suffices.
  - (ii) That the complainant did not consent to that penetration.
  - (iii) That the accused knew that the complainant did not consent to that penetration.

**Count 2**

3. To establish count 2 the prosecution must prove beyond reasonable doubt:
  - (i) That the accused penetrated the complainant's vagina with his penis. The slightest penetration suffices
  - (ii) That the complainant did not consent to that penetration.

- (iii) That the accused knew that the complainant did not consent to that penetration.

### **The trial**

4. The trial ran for two days, from 3 to 4 April 2025.
5. The prosecution called two witnesses, the complainant and D/Cpl 5027 Salavatu.
6. The accused elected to give evidence in his own defence, and called two witnesses.

### **The prosecution case**

7. The complainant is married to the accused and, in July 2024, they were living together in Naleba with the accused's two daughters from his first marriage.
8. At around 6.30pm on Sunday 14 July 2024, she was at home together with the accused and his two daughters. The accused starting drinking, as was his normal weekend routine. He was drinking rum. He mixed some of the rum in a 1.5 litre coke bottle and took it to his brother's house nearby. The complainant stayed at home with their two daughters and they watched movies together.
9. When she saw the lights of the accused's vehicle, they switched off the TV, locked the front door and went to their bedrooms. The complainant pretended she was sleeping because she doesn't like drunk people or the smell of liquor. There were often problems at home when the accused came home drunk. Whenever he is drunk, the complainant doesn't usually speak to him.
10. As she was lying on her bed pretending to sleep, the complainant heard him shouting, asking why they had locked the door. He was growling at his daughter to open the door, which she did. The complainant heard him opening pots and thought that he may be having his dinner.
11. After dinner, the accused came into their bedroom. The complainant had turned off the bedroom light, but she could clearly see him by the tube light in the laundry area. She saw that he was wearing green shorts, and he came and tapped her to wake her up. The complainant said that she did not like that because she well

knew what a drunk man may do to a lady. When the prosecutor asked her to clarify what she meant by that, the complainant explained:

*“Yes, maybe it was me that I thought he might come to bed and he will want to have sex with me which I don’t like ... as husband and wife we can do it when everything is normal, everything is good, we are in good terms ... when he’s drunk, I don’t like to have sex with him.”*

12. The complainant did not tell him “No” at that moment, but did later. The complainant demonstrated how she had shrugged her shoulder to show him that she did not like him tapping her shoulder. The accused forcefully pulled her round neck and she told him to leave her alone. He was on the bed on his knees as he pulled her shorts and came on top of the complainant. She growled at him as he pulled her shorts and tried to push him, but he pushed her back down. The complainant said that he was stronger than her and was very drunk that night. He pulled off her shorts and top.
13. The accused straddled her, took his penis and said “*pio, pio, pio*”, meaning for her to suck his penis. She refused, but he put his penis in her mouth and she felt like vomiting.
14. After he put his penis in her mouth, the accused moved down and inserted his penis into the complainant’s vagina. She pushed him and tried to refuse. When the prosecutor asked the complainant to explain, she said:

*“Like, I was telling him off to get lost from here, go from here, and he was not really in that state that I’m saying something, he just wanted to fulfill his desire, so whatever he wanted”.*

15. The complainant rejected him by pushing him away, and she started shouting for her 14-year-old daughter, Ashreeta.
16. Ashreeta came into the room and told the accused to leave mum alone.

17. The accused left the bedroom and the complainant followed him to the sitting room. She picked up the bottle of rum and shouted at the top of her voice that drinking was the cause of all the trouble in the house. She then smashed the bottle against the table.
18. The accused opened the front door and asked both the girls to go with him to his brother's house. The complainant reminded the girls that she had looked after them from when they were small and said that she would be alone. The girls refused to go with the accused and he drove away on his own.
19. The complainant was on the verandah gathering her thoughts when, after about 30 minutes, she saw the accused's vehicle returning. The accused was in the passenger seat of his Fielder, which was driven by Ashneel. The accused's brother's wife and her sister were in the back seat.
20. The complainant told Ashneel and the two women that the accused was drunk and had taken off all her clothes. She told them to go away as she was going to report the matter to the police. They all left in the Fielder together with the two girls. The complainant was left alone.
21. The complainant called the police and told them that her husband was drunk and that they were fighting. She did not report that she had been raped because she did not know that what her husband had done to her was rape.
22. About 30-45 minutes later, she saw the accused walking towards the house. He banged on the front door and threatened her. As he walked to the back of the house, the complainant jumped from the verandah and hid in the sugar cane farm. She felt safe when she saw that the accused was inside the house and decided to quickly walk to the school junction, where she hid behind the bus stop and waited for the police.
23. At around midnight, she saw the police vehicle approaching and came to the road to stop the vehicle. They took her home and she packed a few belongings before they took her to the police station.

24. At the station, she told the police that she had problems with her drunken husband, but the police did not record her statement until after school that afternoon.
25. When Mr. Tuenuku questioned the complainant about the letter she had written asking for the case against her husband to be withdrawn, the complainant explained that when she was renting at Siberia Branch Road the accused would visit, and they talked things over. She was finding it difficult to pay the rent on her low teacher's salary, and she was also having issues with her son. She was feeling ashamed and thought to try to reconcile with her husband. When pressed on whether the withdrawal letter meant that her husband had not raped her, the complainant stated:

*“Like to whatever I understand the statement which I had given on that day, the first statement, it is true. I’m not saying that it is a false statement I gave. It’s true. It really happened. For me, I can’t forget it, but I can forgive my husband to keep our marriage.”*

26. Under cross-examination, the complainant stated that she had been together with the accused for 9 years, and they got married on 8 April 2020.
27. The complainant agreed that the accused had contributed \$1800 for her level 3 studies, after which she was on a TEL's Scholarship.
28. When asked about how many glasses the accused drank at home on Sunday, 14 July 2024, the complainant said that she did not know as she was not in the sitting room. Whenever the accused was drinking, she would not even look at him.
29. In response to Mr. Dayal asking her whether she had made previous police complaints against her husband, the complainant agreed that she had made three separate reports to Labasa Police Station. She said cases had been reconciled without her consent.
30. When Mr. Dayal put to the complainant that the accused had never visited her at Siberia Branch Road, the complainant said that he had visited her, and it was the

accused who told her that she had to write a letter for their reconciliation in this case.

31. Detective Corporal 55027 Salavatu was called as the second and last prosecution witness. She has served in the Sexual Offences Unit at Labasa Police Station for 3 years.
32. On the afternoon of 15 July 2024, the complainant came to her office. She was emotionally disturbed and D/Cpl Salavatu comforted her. The complainant told her that her husband had removed her clothes and forcefully had sexual intercourse with her which she did not like, and he had made her suck his penis.
33. The complainant had tears rolling down her cheeks as her statement was recorded. When the Court asked for D/Cpl Salavatu's impression of whether the complainant's distress seemed genuine or feigned, D/Cpl Salavatu said that it seemed genuine.
34. At the close of the prosecution case, Mr. Dayal realistically did not seek to argue that the accused did not have a case to answer.
35. I found that there was a case to answer on both counts.
36. When he was given his options, the accused indicated that he would give evidence in his own defence, and informed the Court that he would call two witnesses.

### **Defence Case**

37. The accused said that he has been living with the complainant at Naleba since last year.
38. On 14 July 2024, he was at home. At around 6pm to 6.30pm, he went to his brother's place. He reached home at around 7pm. His younger daughter opened the door. He had dinner and went to his bedroom.
39. His wife started swearing at him loudly, and his elder daughter came to their room. The accused left the bedroom and went to the dining room. His wife followed him to the dining room, took a 40 ounce rum bottle and smashed it.

40. The accused said that he did not have sex with his wife that evening, but did have sex with her that Sunday morning.
41. When asked why his wife would falsely accuse him of raping her, the complainant said that she was upset by his attitude when they had sex the day before. His injured wrist was painful. He explained that a tyre had fallen on his wrist, and the injury required surgery.
42. When asked again why his wife would make a false allegation against him, the accused said that she may be having an affair.
43. After his wife smashed the bottle of rum, he went to his brother's house because the complainant was making false allegations about raping her. He returned home with his sister-in-law and her two children. The complainant made allegations to his sister-in-law, including that he had put his penis in her mouth. Then, they all returned to his brother's house, together with his two daughters.
44. The accused said that upon returning to his brother's house, he just slept there. After 3 or 4 days the police came and arrested him.
45. The accused said that everything the complainant alleged against him is a lie.
46. In cross-examination, the accused confirmed that he was still able to have sex with the complainant notwithstanding his injured wrist. He also confirmed that when his in-laws went home with him that evening, the complainant had told them that he had put his penis inside her mouth.
47. The second defence witness was Ashreeta, his 14-year-old daughter by his first marriage. On 14 July 2024, she was at home with her younger sister and her mother and father. Her father went to her uncle's place at around 6pm and returned home at around 7pm.
48. When her father arrived, her mother told them that they should turn off the movie and go to bed.
49. When her father knocked on the door, her sister opened the door. Her father had his dinner and then went to his room. She heard her parents arguing. Her mother

asked why her dad had been drinking. She went inside her parent's room to see what was happening. She saw her mother kick her father. Her father told her to make a video, but her mother snatched the phone and threw it away. Her dad went outside and took off in his vehicle.

50. When asked by Mr. Dayal why she had gone to her parent's room, she said that her mother was shouting.
51. After her father had left, her mum called her family to inform them. She said she would run away.
52. Ashreeta was not cross-examined.
53. The final defence witness was Mr. Ashneel Chand. The accused is his uncle's brother.
54. On 14 July 2024, he attended a family gathering at Suren Chand's house at Naleba. At around 6.30pm, the accused joined the gathering. He drank a small amount of a mixed drink he had brought with him and then returned home after about 20 minutes.
55. About half an hour later, he returned to the gathering and said that his wife was fighting with him. He asked them to talk to his wife. He drove back to the accused's house together with his mother and aunty, and the accused.
56. When they arrived at the accused's house, the complainant swore at the accused. She told the witness that the accused had removed her clothes and tried to rape her. She was angry.
57. They left together with the accused's two daughters. The daughters went to Suren's house and the witness dropped the accused at his sister's and brother-in-law's place.
58. In cross-examination, Mr. Chand said that he dropped the two girls at Suren's place and then drove the accused to the accused's sister's house at Wailevu.

59. In response to a question from the Court, Mr. Chand said that he dropped the accused at around 10.15pm and doesn't know where the accused went after that.

### **Closing submissions**

60. I heard closing speeches on 4 April 2025, and I have also read the defence and prosecution written submissions. I have considered everything advanced by both parties.

61. The main thrust of the defence case is that the complainant made a false allegation because she wanted to get rid of the accused. Mr. Dayal advances the following motives for the complainant's false allegations:

- (i) The complainant was upset that the accused did not allow her to go on top during sexual intercourse on Saturday 13 July 2024;
- (ii) The complainant wanted to get rid of him because she had several boyfriends.
- (iii) The complainant wanted to get rid of the accused because she did not like his daughters.

62. The defence also placed heavy reliance on the fact that the accused had suffered a serious wrist injury which required 18 stitches. It is suggested that the accused was "*disabled through the injury*". Mr. Dayal asks rhetorically (in bold):

***"The question is, how can the accused have forceful sexual intercourse with the victim singlehandedly when the victim herself is a fit person who could have easily pushed away the accused while he was raping and having forceful sexual intercourse."***

63. Mr. Dayal also points out that the prosecution did not lead any medical evidence and that there were no signs of a struggle, tearing of clothes or bruising.

64. In his closing speech, Mr. Tuenuku placed emphasised the complainant's detailed evidence about the incident. In support of his submission that the complainant was an honest witness, Mr. Tuenuku points to her acceptance that the accused

had supported her studies financially, and also accepted that she wrote a withdrawal letter, for which she gave a reasonable explanation.

65. Mr. Tuenuku makes the point that the withdrawal letter undermines the defence suggestion that the complainant fabricated allegations in order to get away from the accused. Her evidence points to her being dependent on his continued financial support.
66. The prosecution submits that the evidence led by the defence tends to support the complainant's evidence about the sequence of events on the evening of 14 July 2024.
67. Mr. Tuenuku attaches significance to the complainant's distressed state when her witness statement was recorded. He also submits that her conduct in immediately telling her in-laws about what the accused had done to her supports her credibility.
68. Finally, the prosecution dismiss the suggestion that the accused's injury has any relevance to the alleged rapes. He was plainly not incapacitated. On his own case, the accused was capable of engaging in sexual intercourse.

### **Legal Directions/Warnings**

69. The prosecution must prove that the accused is guilty. The accused does not have to prove anything to me. The defence does not have to prove that the accused is innocent. The prosecution will only succeed in proving that the accused is guilty if I have been made sure of his guilt. If, after considering all of the evidence, I am not sure that the accused is guilty, my verdict must be not guilty.
70. I remind myself that if the accused's denials are, or may be, true, I must find him not guilty. Even if I reject the accused's evidence, I must not find him guilty unless the prosecution have been made me sure of his guilt.
71. The prosecution relies on evidence that the complainant made a recent complaint to D/Cpl Salavatu and was distressed and crying when her witness statement was recorded. I remind myself that a complaint is not evidence of truth. Also, just

because a person gives a consistent account about an event does not necessarily mean that account must be true.

72. In considering the evidence that the complainant was crying and distressed when her witness statement was recorded, I need to bear in mind three things. First, there is no “normal” reaction to a rape. Some people will show emotion or distress and may cry. But other people will seem very calm or unemotional. Second, it is possible for someone to put on an act if they choose to. Third, even if a complainant’s distress is not feigned, it is not necessarily indicative of the accused’s guilt.
73. When the complainant gave evidence, she appeared calm and unemotional. I remind myself that I must not assume that the way she gave evidence is an indication of whether or not the allegation is true. Witnesses react to giving evidence about allegations of rape in a variety of ways. Some people will show emotion or distress. But other people will seem very calm or unemotional. The presence or absence of distress when giving evidence is not a good indication of whether the witness is telling the truth or not.
74. Since the defence have advanced a number of motives for the complainant to have lied, I warn myself that the accused bears no onus to prove a motive to lie, and rejection of the motives asserted does not necessarily justify a conclusion that the complainant’s evidence is truthful. A motive to lie or be untruthful may substantially affect the assessment of the credibility of a witness, but it would be wrong to conclude that the complainant told the truth because there is no apparent reason for her to lie. There might be a reason for her to be untruthful that nobody knows about.

### **Analysis and determination**

75. The battle lines have been clearly drawn. The defence says that the allegations against the accused have been fabricated. They have advanced, explicitly and implicitly, motives for these allegations to have been fabricated. I shall return to these motives below.

76. Essentially, what it boils down to is whether I am sure that the complainant is a truthful and reliable witness whose evidence, considered separately in connection with each count, makes me sure that the accused is guilty as charged. Also, I must be sure that the accused's denials are untrue.
77. It follows that the prosecution case relies solely on my assessment of the complainant's reliability and credibility.
78. The complainant is a mature woman who has been in a long-term relationship with the accused. The evidence reveals that their relationship was somewhat volatile.
79. The complainant testified about what, if true, must have been a very upsetting incident in a mature, calm and measured way. She was clear and coherent in her recollection. Her descriptions of what the accused did to her were unembellished and plausible. She withstood vigorous cross- examination and was not discredited. When her evidence about not undergoing a medical examination was challenged, the complainant accepted that she had, in fact, been examined and clarified that her private parts were not examined by the doctor.
80. My impression of the complainant is that she has firm views on acceptable standards of behaviour, and what she does and does not like. Plainly, she frowns upon the accused drinking alcohol. That evidence was unchallenged. It is important evidence because it provides relevant context to the events on the evening of 14 July 2024. To my mind, it makes the complainant's evidence about refusing to engage in sexual activity with her husband that evening because he was in drink more likely to be true.
81. There is no dispute that the couple were in their bedroom alone for a period of time that evening. It is not suggested that the accused did not have the opportunity to rape his wife. Only they truly know what went on in their bedroom.
82. The accused's evidence about the central issue of what occurred in the marital bedroom does not ring true. His account of his wife loudly berating him about his "*bitches*" makes no sense in the context that she knew very well that he had paid a short visit to a social gathering at his brother's house. I am sure that this part of

his evidence was concocted to explain the commotion that erupted when he forced himself on the complainant without her consent.

83. Ashreeta's evidence is important in this regard because it supports that something untoward happened in her parent's bedroom that evening. Whilst she did not support the complainant's evidence that she had called Ashreeta into the room, I consider this to be peripheral to the main point that something sufficiently alarming happened to cause Ashreeta to go into their bedroom. She saw her mum kick her dad – something she had never seen before.
84. I reject the accused's evidence about the complainant's motives for making false allegations against him. The suggestion that she harboured resentment about his refusal to participate in a particular sexual position on Saturday makes no sense in the context of his evidence that they engaged in consensual sex on Sunday morning.
85. There was no evidence adduced supporting that she wished to leave the accused for her 'boyfriends'. Indeed, the fact that the complainant reconciled with the accused, and resumed cohabiting, totally undermines the suggestion that the allegations were fabricated to facilitate the complainant leaving the accused.
86. The defence case that the accused was incapable of pushing his wife onto the bed and forcing his penis into her mouth and vagina without her consent does not stand up to scrutiny. His wrist injury did not prevent him going about his daily tasks such as driving. On his own account, it did not inhibit him from engaging in consensual sex with his wife. I have no doubt that the accused's injury did not render him incapable of raping his wife in the manner she described in her testimony.
87. I have no hesitation in rejecting the accused's denials.
88. After carefully considering all the evidence, I find the complainant to be a truthful and reliable witness. I have no hesitation in accepting her testimony about what the accused did to her on the evening of 14 July 2024.

89. I find that the manner in which she complained to the accused's family members in the immediate aftermath of the incident, and her prompt report to the police, supports her credibility. I am untroubled by the fact that she did not immediately report to the police that she had been raped by her husband. Her explanation that she did not appreciate that what her husband had done to her was rape is perfectly understandable in a socially conservative society such as Fiji.
90. I accept the complainant's evidence that the accused penetrated her mouth and her vagina with his penis on 14 July 2024, and that she did not consent to those penetrations. I am sure that the accused knew that the complainant did not consent to those penetrations. She had made that perfectly clear to him.
91. It follows from what I have said above that I am sure that the accused is guilty as charged and I convict him accordingly.
92. 30 days to appeal to the Court of Appeal.

A handwritten signature in black ink, consisting of a stylized "H" and "B" followed by a long horizontal line that tapers to the right.

Hon. Mr. Justice Burney

**At Labasa**

9 May 2025

**Solicitors**

**Office of the Director of Public Prosecutions for the State  
Dayal & Associates for the Accused**